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APPENDIX

Supreme Court of the United States

TERM, 1971

No. 70-5097

ALEXANDER MCCLANAHAN,

Petitioner,

vs.

MORAUER AND HARTZELL, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 30, 1971
CERTIORARI GRANTED JUNE 1, 1971

Supreme Court of the United States

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UNITED STATES DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION
DISTRICT OF COLUMBIA COMPENSATION DISTRICT

Case No. 5966-244

In the Matter of the Claim for Compensation Under the District of Columbia Workmen's Compensation Act

ALEXANDER MCCLANAHAN, CLAIMANT

vs.

MORAUER & HARTZELL, INC., EMPLOYER,

LIBERTY MUTUAL INSURANCE COMPANY, INSURANCE CARRIER

COMPENSATION ORDER AWARD OF COMPENSATION

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and no hearing having been applied for by any interested party or considered necessary by the Deputy Commissioner, and stipulations having been submitted by the interested parties, the Deputy Commissioner makes the following

FINDINGS OF FACT

1. That on October 19, 1962, the claimant above named was in the employ of the employer above named, whose address is 1620 Second Street, Southwest, Washington, District of Columbia; that the employer was subject to the provisions of an Act of Congress approved May 17, 1928, entitled "An Act to provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia, and for other purposes"; that the liability of the employer for compensation under the said Act was insured by the Liberty Mutual Insurance Company;

2. That on the said day the claimant herein, while performing services for the employer as a laborer and while worknig in an excavation, sustained injury resulting in his disability when a steel rod fell into the excavation and struck him on the head, as a consequence of which he suffered a laceration of the scalp and cerebral concussion; that the injury arose out of and in the course of the employment;

3. That written notice of the injury was not given to the employer within thirty days, but that the employer had knowledge of the injury and has not been prejudiced by the lack of such written notice;

4. That the employer furnished the claimant with medical treatment, etc., in accordance with the provisions of section 7 (a) of the Act;

5. That the average weekly wages of the claimant herein at the time of the injury were $134;

6. That as a result of the injury the claimant has been wholly disabled from October 20, 1962 to November 1, 1963, inclusive, 54 weeks, and for such temporary total disability he is entitled to compensation at the maximum rate of $70 per week, in the amount of $3,780;

7. That the employer and the insurance carrier have paid the claimant $800 as compensation.

Upon the foregoing findings of fact, the Deputy Commissioner makes the following

AWARD

That the employer, Morauer & Hartzell, Inc., and the insurance carrier, Liberty Mutual Insurance Company, shall pay to the claimant compensation for temporary total disability for 54 weeks at the rate of $70 per week, from October 20, 1962 to November 1, 1963, inclusive, in the amount of $3,780. The employer and the insurance carrier, having already paid $800, shall pay forthwith the balance of $2,980.

Attorneys fees for legal services rendered the claimant in connection with this claim is approved in favor of Philip J. Lesser, Esq., in the amount of $150 and in

favor of Aaron M. Levine, Esq., in the amount of $400, such fees to be a lien upon and paid out of this award.

Given under my hand and filed at Washington, D. C. this twenty-fourth day of August, 1964

/s/ Hermon Adler
Deputy Commissioner
District of Columbia
Compensation District

[Proof of Service (Omitted in Printing)]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1895-65

[Filed Mar. 3, 1967, Robert M. Stearns, Clerk.]

ALEXANDER MCCLENAHAN and
CHRISTINE E. MCCLENAHAN, PLAINTIFFS

vs.

RAY GAINS, INC., A Body Corporate, DEFENDANT

CONSENT JUDGMENT

This cause coming on to be heard by a jury on the 20th day of February, 1967, and all parties being present in person and by counsel, and it appearing that all parties and their counsel consent to the Judgment as hereinafter set forth, it hereby is by the Court:

ORDERED:

That judgment be entered against the defendant, Ray Gains, Inc., in favor of the plaintiff, Alexander McClenahan, in the amount of Two Thousand ($2000.00) Dollars, and that judgment be entered against the defendant, Ray Gains, Inc., in favor of the plaintiff, Christine E. McClenahan, in the amount of Three Thousand ($3000.00) Dollars.

/s/ Luther W. Youngdahl
Judge

WE CONSENT:

/s/ John Louis Smith, Jr.
Attorney for plaintiffs

/s/ J. F. Mahoney
Attorney for defendant

A TRUE COPY
6-21-71

JAMES F. DAVEY
Clerk

By /s/ Christine E. Poindexter
Deputy Clerk

[SEAL]

* * * *

[fol. 2] U. S. DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION

Docket No. 5966-244

ALEXANDER MCCLANAHAN, CLAIMANT

v.

MORAUER & HARTZELL, INC., EMPLOYER,

LIBERTY MUTUAL INSURANCE COMPANY,
INSURANCE CARRIER

Vanguard Building
1111 20th Street, N. W.
Washington, D. C.
Monday, December 11, 1967

The above-entitled matter came on for hearing, pursuant to notice, at 10:40 a.m.

BEFORE:

THE HONORABLE E. D. WOODWORTH, Deputy Commissioner

APPEARANCES:

For the Claimant:

JOHN L. SMITH, ESQ., Suite 850 Washington Building, 15th Street and New York Avenue, N. W., Washington, D. C. 20005

For the Respondents:

MACLEAY, LYNCH, BERNARD & GREGG, By: THOMAS M. O'MALLEY, ESQ., 1625 K Street, N. W., Washington, D. C.

[fol. 3]

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WITNESS:	*DIRECT*	*CROSS*
Marvin Curtis Korengold	9	17

EXHIBITS

	Received	*Appear*
Deputy Commissioner's Exhibit No. 1 (Copy of Employee's Claim for Compensation)	5	39
Deputy Commissioner's Exhibit No. 2 (Copy of Compensation Order dated August 24, 1964)	5	
Respondents' Exhibit A (Copy of Consent Judgment filed March 3, 1967)	37	

PROCEEDINGS

[fol. 4] THE DEPUTY COMMISSIONER: Let's go on the record.

The hearing in this case is being held upon the application of the claimant, Alexander McClanahan, 1836 D Street, Northeast, Washington, D. C. The claimant is represented by John L. Smith, Jr., Esquire, Washington Building, 15th and New York Avenue, Northwest, Washington, D. C. The employer is Morauer & Hartzell, Incorporated, 1620 2nd Street, Southwest, Washington, D. C. Their insurance carrier is Liberty Mutual Insurance Company.

On August 21, 1964, the parties submitted stipulations, and on August 24, 1964, a compensation order was filed by the Deputy Commissioner awarding compensation to the claimant for temporary total disability from October 20, 1962 to November 1, 1963, inclusive, 54 weeks, at the maximum rate of $70 per week in the amount of $3,780, as a result of the injury the claimant sustained on October 19, 1962.

The claimant's average weekly wages at the time of the injury were $134.

On August 28, 1964, the insurance carrier filed Form BEC-208 showing payment made on August 24, 1964, in accordance with the award.

[fol. 5] On July 26, 1967, the claimant filed claim against the employer for additional benefits under the District of Columbia Workmen's Compensation Act.

A copy of the claim will be made Deputy Commissioner's Exhibit Number One.

(The document referred to was marked Deputy Commissioner's Exhibit No. 1 for identification and received into evidence.)

The compensation order of August 24, 1964, will be made Deputy Commissioner's Exhibit Number Two.

This will be introduced into evidence and will be marked Deputy Commissioner's Exhibit Number Two.

(The document referred to was marked Deputy Commissioner's Exhibit No. 2 for identification and received into evidence.)

Mr. Smith, would you please state the claim at this time.

MR. SMITH: Yes.

What the claim comes down to, Your Honor, is that Mr. McClanahan's situation when he signed this stipulation was that he was physically well. He never at any time has ever said that he was emotionally—His nervous system was his biggest claim at the time he filed this [fol. 6] action. Now he is filing to modify this award of 1964 on the basis of his nervous condition.

THE DEPUTY COMMISSIONER: Your claim, then, is for additional compensation.

Now, could you state—Is this for a per cent of permanent disability or partial disability or total disability?

MR. SMITH: Well, it has been total disability.

THE DEPUTY COMMISSIONER: You are claiming permanent and total disability, or temporray total disability?

MR. SMITH: I think we're claiming permanent disability, sir.

THE DEPUTY COMMISSIONER: It is for permanent disability?

MR. SMITH: Or—I guess total, it will be total disability during this past three years.

THE DEPUTY COMMISSIONER: Permanent total disability?

MR. SMITH: Yes, sir.

THE DEPUTY COMMISSIONER: All right.

Then your claim is for permanent and total disability as a result of the injury the claimant sustained on October 19, 1962.

MR. SMITH: October 18th, I believe it is—19th. [fol. 7] Pardon me.

THE DEPUTY COMMISSIONER: All right.

And that is your claim.

Now, are you claiming additional medical treatment?

MR. SMITH: Yes, there is a need for medical treatment too. Yes.

THE DEPUTY COMMISSIONER: Then claim is for additional medical treatment.

MR. SMITH: Yes.

THE DEPUTY COMMISSIONER: The claim for additional benefits has been controverted by the employer's insurance carrier.

Mr. O'Malley, would you state the grounds for controversy.

MR. O'MALLEY: The position of the carrier is that the condition of the claimant is not related to the injury that he may have sustained on October 19th, 1962.

But further than that and prior to going into the merits—And I would not want to argue it now, although I would after Dr. Korengold testifies, if I may—we claim that there is a bar to further recovery by virtue of the fact that there was a prior settlement in a District Court [fol. 8] case wherein the rights of the carrier were prejudiced in that he was not requested to consent to a settlement as regards a third party.

THE DEPUTY COMMISSIONER: You're talking about a settlement as a result of a third party suit. Is that right?

MR. O'MALLEY: Yes, sir.

THE DEPUTY COMMISSIONER: I see.

MR. O'MALLEY: And I would like to preserve that point and argue it, as I say, after Dr. Korengold's testimony.

I don't care to hold him up any further.

THE DEPUTY COMMISSIONER: All right.

Shall we, then, take the testimony of the Doctor.

MR. SMITH: Yes, sir.

Mr. Commissioner, I also would like to have a ruling on Mr. McClanahan's leaving the room during the testimony of the Doctor. It is at the Doctor's request, and the other attorney agrees to it.

MR. O'MALLEY: No objections.

THE DEPUTY COMMISSIONER: All right.

Mr. McClanahan, would you retire to the waiting room right through that door there. You know where the waiting room is.

(The claimant departed the hearing room.)

[fol. 9] Whereupon,

MARVIN CURTIS KORENGOLD

was called as a witness by and on behalf of the Claimant and, having first been duly sworn by The Deputy Commissioner, was examined and testified as follows:

THE DEPUTY COMMISSIONER: Would you give the Reporter your full name, address and medical specialty.

THE WITNESS: Marvin Curtis Korengold, 2141 K Street, Northwest, Washington. I am a physician specializing in neurology.

THE DEPUTY COMMISSIONER: Is there any question regarding the Doctor's qualifications?

MR. O'MALLEY: We stipulate to the Doctor's qualifications.

THE DEPUTY COMMISSIONER: All right.

You may start your questioning, Mr. Smith.

DIRECT EXAMINATION

BY MR. SMITH:

Q Dr. Korengold, do you recall when you first examined Mr. McClanahan?

A Yes.

Q Would you state for the record the date.

A July 15th, 1963.

Q And do you know how many times you saw him at [fol. 10] that time?

A I believe I saw him on just one occasion.

Q All right.

A In my office.

Q And do you recall the discussion that you had with him?

A Yes.

Q And could you tell us what he told you at that time regarding his symptoms?

A He stated that he was injured in the course of his employment at approximately nine-thirty a.m. while on

a construction job when a piece of metal fell, striking him on his head. He stated that it struck him over the posterior vertex of his scalp, knocked him down, and he was momentarily dazed, had a sensation of faintness and noted a poor memory for the events that took place subsequently.

He told me that he had a laceration of his scalp that required approximately 15 stitches and that these were taken at the Washington Hospital Center.

These were the details of the accident itself.

He further stated that since the accident he had been unable to return to employment, that he had been seen by many physicians, with failure to improve to his pre-
[fol. 11] injury level.

He stated that he felt that he had shown some improvement but that he remained seriously disabled.

He complained of constant head pains and headaches, increased nervousness and sensations of near-fainting.

This was the essence of the historical data that he gave me.

Q All right.

Did you diagnose what his malady was at that time?

A Well, yes, I did.

I took additional history of his medical background and examined him and came to a conclusion.

Q All right.

And would you state for the record what this conclusion was.

A It was my conclusion on the basis of the history, the examination and electroencephalogram that the patient had sustained a mild cerebral concussion on October 19th, the date of his accident, and had shown some improvement since that time.

In addition, he sustained a laceration of the scalp which left a well healed, non-tender scar.

[fol. 12] Now, these were the two main physical diagnoses.

And the third diagnosis was that he exhibited a marked anxiety reaction.

Q I see.

Did you relate this anxiety reaction to any prior history?

A Yes, I did.

This patient had a prior history of nervousness prior to the accident, and it was my feeling that the accident exacerbated his nervous disorder and that it resulted in an increase in his emotional symptoms and an inability to return to his usual employment at that time.

Q All right.

Have you examined him since that time, Doctor?

A Yes, I have.

Q Did you have a conversation with him or anything that would bring out anything different from what you have had so far?

A Well, I saw him on two occasions since then, once in October of 1965 when he appeared at the Veterans Hospital for a neurological consultation and I happened to be the consulting physician.

[fol. 13] And I saw him subsequently in my office in February of 1967.

And on both of these occasions his basic complaints were the same.

And as a result of my last office consultation in February of 1967, it was my feeling that he had no evidence of any physical residual injury from his accident other than the basic nervous personality type of disorder that he had displayed and the role that the accident played in terms of added stress.

So essentially my feelings were the same.

Q I see.

Has he—Is he open to conversation or medical—You know, care, therapy?

A My feeling was that this man was very fixed in his attitudes about his illness and was most resistant and hostile to suggestions that his problem was not physical.

He commented that many doctors have examined him and had been unable to find a physical explanation for all of his complaints, and he refused to accept this.

He told me that he could not believe that there was nothing wrong with his head that would cause his head to ache so badly and that he would be in such continual and [fol. 14] severe distress. And despite reassurances from numerous sources that there was no physical explanation

for this, it was his feeling that the doctors were not accurate.

I had suggested to him in 1965 when he saw me at the Veterans Hospital that some additional studies be obtained at the VA, which he refused because he stated that he had had studies before and they never showed anything.

I suggested in 1967, February, at the time of his office visit, that we repeat the electroencephalogram in the event something would show at this time that was not apparent before. And he refused to have this test done also.

And it was my impression that he was not open to medical therapy in terms of his own mental attitude, that he was rigid and fixed and unlikely to show any significant improvement.

Q Would you call this rigidity of his thinking a part of his disorder?

A I think this is part of his basic personality, yes.

Q I mean when you say his condition was exacerbated by the accident, are you referring to this type of thing, this rigidity in thinking?

[fol. 15] A No, I wasn't thinking specifically of that. I was thinking of the fact that we have an individual whose past history prior to the accident indicated that he had what we would generally call a nervous type of personality, but he was able to be employed and, at least prior to the accident, he was able to work.

Along comes the accident, he is injured, and this is enough of an added straw to the camel's back that he now is decompensating and is unable to return to his job, of a fear perhaps of what the injury might do to his head or to his thinking.

However in his own mind he interpreted his own accident, he then became unable to do the tasks he had been able to do previously, despite the fact that his injury was not of serious proportion and despite the fact that he showed normal healing and despite the fact that the doctors other than myself, as well as myself, examining him found no explanation of a physical nature for his continued complaints.

He was unwilling and unable—And I think the "unable" perhaps is the important word—to accept this.

And it was in this area that I was referring to an exacerbation of his nervous disorder.

This became an added burden for his relatively deli- [fol. 16] cately balanced personality.

Q I see.

As a final question, do you think this condition is permanent?

A It was my feeling that this patient needed psychiatric evaluation and psychiatric treatment. And I believe I suggested this in my letter of 1963.

If I might read from my conclusion, the last paragraph states:

> The patient might benefit from some type of psychiatric therapy, but he gives the appearance of being quite well fixed in his attitudes and will most unlikely be resistant to any type of therapeutic approach. He has considerable hostility to any and all who have suggested in the past that there is no organic basis for his complaints. He has no motivation, no insight, which would certainly complicate any type of plan for recovery.

And paraphasing this paragraph, it suggests to me that the only hope for this man might be in the field of psychiatry, but I have some doubts that they would be successful.

MR. SMITH: I have no further questions.

THE DEPUTY COMMISSIONER: Mr. O'Malley, you may cross-examine the Doctor.

[fol. 17] CROSS EXAMINATION

BY MR. O'MALLEY:

Q Doctor, the observation you made in 1965, you did not include that as a part of your report of June 15, 1967, did you?

A No, I did not. And the reason for it is that serving in the capacity of consulting neurologist at the Veterans Administration, I saw him at the Veterans Administration quite coincidentally. It was a routine referral by one of the doctors at the VA for a neurological opinion.

He came in, sat down, took one look at me, recognized me as the doctor who had seen him previously, and was quite hostile, and after talking to me briefly and refusing any type of further testing or trial on medicine, he walked out. And I just put a little note in his record here, just as a reminder to me, that this man had been seen.

But this was two years prior to the time that he was seen in '67.

But this was not related at all to the report.

Q So that observation, if you will, in '65 in no way detracts from or derogates from your report in 1967?

A No. I think it is just another evidence of con-
[fol. 18] sistency, the appearance of this man and my impression.

Q Now, you also indicated that you had suggested several tests to Mr. McClanahan and he declined; for example, to take another EEG. Is that correct?

A Yes.

Q And he was of the opinion that it wouldn't help?

A He stated that the test made him worse following the first time he had the test.

And if I might explain just one step further, the electroencephalogram is a test in which we paste between 15 and 20 wires to the scalp. There is no discomfort to it, there is no sensation at all, you just lie down and the machine takes a tracing. The only bad part of the test is that you have a little paste in your hair which has to be showered out.

It was his impression that the test made his head worse, his headaches worse. And he refused to have it done another time.

THE DEPUTY COMMISSIONER: There is no history, Doctor, that there have ever been any aftereffects from an examination of this type—

THE WITNESS: In this man—

THE DEPUTY COMMISSIONER: —electroencephalogram?

[fol. 19] THE WITNESS:—or in anybody?

THE DEPUTY COMMISSIONER: In anyone.

THE WITNESS: Oh, absolutely not.

BY MR. O'MALLEY:

Q Doctor, you had indicated too, I believe, in your report that you had given him a number of tests, including a pinprick test and your observation was that his condition had improved from what you had observed in 1963.

A Yes.

Q Could you tell us to what degree?

A Well, I have a comment here in his first examination that the patient was highly tense and anxious during the examination. He over-reacted to all types of external stimuli.

When a tuning fork was placed on top of his head, he reacted with a mass reflex type of withdrawal.

Now, a tuning fork— which you may or may not be familiar with—just emits a sound and a vibration; and when it is put on top of the head, a noise goes to the ears. It is just a humming sound.

When this tuning fork was placed on top of his head, he responded with (demonstrating) a mass sort of reflex withdrawal as if this were a tremendous discomfort.

[fol. 20] When I would test him with pins, he did the same type of thing. We use a pinwheel. It is a wheel that has many sharp spokes on it and we just run it up and down the skin, and it has a prickly sensation to it, it's not uncomfortable, you can feel it. But it is a routine kind of test, and some people may say, you know, it's uncomfortable or it's sharp or it feels like pins sticking them. But it is the kind of test we do with little babies on up, and it has a sort of standardized response.

He withdrew again in the same general hyper-reactive fashion, as if he were being stabbed individually with these points. And this is always the response of a very tense and anxious individual.

And I think I made comment to this in my report.

Examination of the sensory system again demonstrated a marked over-reaction to pinprick stimulation.

When I tested him in 1967 with the tuning fork and with the pins, it was noted that he did not do this to the same magnitude, and I believe I commented in my report about this.

His previously described behavior of marked withdrawal from the tuning fork and pinprick and other [fol. 21] stimuli was not as noticeable on this occasion as previously.

So in this sense one would say Yes, there has been improvement.

Q And how do you explain the exaggerated reaction to both the tuning fork and pinprick, in accordance with your observation that his condition has improved?

A I'm not sure that I understand your question.

A As I understand, it was your observation that this was a most unusual reaction for this particular man, to react the way he did to the striking on the head with the tuning fork. And you also say there was an exaggerated reaction to the pinprick.

A Well,—

Q Is that consistent with your observation that his condition had improved?

A Oh, yes. Yes.

His over-reaction to the tuning fork and to pins was not a physical response, this was an emotional response, this was a sign of anxiety, nervoueness, of his basic type of personality. This is not a physical kind of response.

When he was re-examined a few years later in 1967, I did not demonstrate the same magnitude of this. [fol. 22] So this did indicate to me that there was an improvement in at least this phase of his personality.

He continued to complain about his head as severely as before, but at least in terms of his response on the testing situation there was noticeable improvement in this area.

Q Was it your impression at that time, Doctor, that possibly these reactions were actually deliberate responses to the tuning work and pinprick rather than physical reactions?

A I don't think that it was my impression that they were deliberate responses in the sense of a malingering type of response. I don't believe I felt that at all.

I felt that this was just a factor of a highly tense, nervous person who was expecting the worst and interpreted whatever he got in this fashion.

This was not an organic response, this was part of his personality complex that he reacted this way.

I don't think that this—I didn't have the feeling that this was a controlled reaction. It was physical in the sense that he had control over it, but wasn't able to exhibit this.

It would be almost the same as if under hypnosis you [fol. 23] told someone you were going to burn them with a match and you pretended to do this. You would withdraw, even though there was no flame there. If you felt there was, you would do this. In a sense you have control over it, but in another sense it is sort of an involuntary thing.

This was the basic feeling I had about this man, was that to him the tuning fork was tremendously disturbing. This was not because it in actuality was, but because in his mind he thought it was. If I make myself clear.

Q Yes.

Now, Doctor, with regard to the man's condition prior to the injury of October 19, 1962, you have determined from the history what his particular condition was at that time.

Is that correct?

A I had determined from the history that he had other evidences of a personality type disorder and had demonstrated other symptoms and a past history consistent with an individual who was suffering from emotional dysfunction, at least at some point prior to the accident.

Q Now, this personality disorder, is that the sort of thing that begins at birth, or would your history be able [fol. 24] to pinpoint just when it did start?

A No, my history didn't pinpoint when it started. But it certainly is of many years' duration.

One would think that this is the kind of thing that begins somewhere in childhood or adolescent life and continues.

But the specific evidence that I had from the record was incidents that had occurred prior to the accident indicating that he was suffering from a nervous disorder.

Q Then in your examination in 1963 you made the observation that his condition had improved since the trauma of October of '62.

A My examination didn't indicate this. The patient stated this, and I was merely repeating this, because I had nothing to compare it with other than his history and medical data.

But it was his impression that he had shown improvement in certain areas.

Q All right.

And did your examinations and observations confirm the impression which he gave you that he had in fact improved since the trauma?

A Yes. It did in the sense that his examination was negative as far as anything organic was concerned.

[fol. 25] Q I see.

A Except the scar that was present on his head that wasn't tender.

But otherwise he was completely normal from an objective point of view.

Q And then his condition again had improved when you observed him in 1967.

Is that correct?

A Yes, that's correct.

Q Now, Doctor, did you make a determination as to what the result of all this improvement that exists in the man today is, relative to what his condition was prior to this trauma, or relative to what his condition was immediately subsequent to the trauma?

A I'm not sure that I understand the entire question.

Q Well, we started at a particular yardstripe, on October 18 theoretically, as to what this man's condition was. And then as a result of the trauma it deteriorated. And subsequently, in 1963, at the time of your observation, it had improved. And then again in 1967 it had improved.

Can you testify now that his condition is the same or better or worse than it was on October 19, 1962, just prior to—

[fol. 26] MR. SMITH: I object to one thing, Mr. O'Malley.

I don't think he said that. He said that it improved. I think you said that the—Just the way you stated the question, I don't think it is quite correct.

MR. O'MALLEY: I think the Doctor said that his observations confirmed the impression that Mr. McClanahan gave him that his condition had actually improved.

BY MR. O'MALLEY:

Q But if you can answer it and correct any misstatements that I made, would you.

A All right.

I don't know the status of his physical or emotional health on the day of or prior to his accident. I am aware of the medical record indicating that prior to the accident for undetermined periods of time he had suffered from emotional problems and emotional dysfunction. I am not certain whether this preceded it by six months or six years at the moment, without referring to specific dates. So I can't say immediately prior to the accident, in terms of the hour before or the day before or the week before, other than to state that this is a man who had a nervous [fol. 27] disorder, was then injured, suffered an injury, healed the injury and continued to manifest exaggerated emotional responses that under normal circumstances in a normal individual would have returned him to active employment within relatively short order. But because of his pre-existing nervous disorder, this acted as an added stress factor and has complicated his recovery.

And I think in some ways, although physically he is improved to the point where from a physical point of view I find nothing, he has shown some emotional signs of perhaps more disability than he might have had at an earlier date.

I can't answer your question categorically, Is he better or worse today than he was on the day of his accident, or the day just prior to his accident, because I don't know that status, other than that he was employed at that time and he's not employed now, so that I am not misunderstood at all.

THE DEPUTY COMMISSIONER: Doctor, there is some information in the administrative file that the claimant was receiving a per cent of disability from the Veterans Administration as a result of a prior emotional problem.

Did you have any information regarding what per cent he was receiving?

[fol. 28] THE WITNESS: No, I did not.

THE DEPUTY COMMISSIONER: I see.

THE WITNESS: No, I did not. I knew nothing about any pension he was receiving from the Government.

I wasn't even aware that he was involved with the Government at all until he appeared at the Veterans Administration in 1965, and I knew that he had to be a service-connected veteran to be referred to me. But I really didn't have any data as to this.

THE DEPUTY COMMISSIONER: I see.

Would you venture an opinion as to what the extent of the claimant's permanent—or temporary, whichever you feel it is—disability is at the present time?

THE WITNESS: From a neurological point of view, his disability is zero, in terms of neurologic testing and function.

From an emotional point of view, this really becomes a psychiatric determination, which I don't know would be fair of me to state. But from what I have been able to see and observe of this man, I feel he is emotionally seriously disabled. And I am not taking the position that he is emotionally disabled at this point because exclusively of the accident, or even necessarily in part [fol. 29] because of the accident.

I am taking the position that the accident increased his emotional stresses and helped to fixate in some way this man upon his emotional symptoms.

THE DEPUTY COMMISSIONER: You feel, then, that this injury aggravated his pre-existing emotional problem.

Is that right, Doctor?

THE WITNESS: Yes, I think this was an added burden to him that—

THE DEPUTY COMMISSIONER: Do you feel he is totally disabled from performing any type of work?

THE WITNESS: From a physical point of view, no.

THE DEPUTY COMMISSIONER: From an—

THE WITNESS: But from an emotional point of view, I cannot visualize this man working, unless the psychiatrists are able to help him.

THE DEPUTY COMMISSIONER: Do you think that in his condition, work would be good for this claimant?

THE WITNESS: Yes, I do.

THE DEPUTY COMMISSIONER: Would you have any suggestions as to what type of work you think he might be able to do in his present condition?

THE WITNESS: I think he might be able to do most [fol. 30] any type of work for which he is intellectually and vocationally able to do by virtue of his past work experience, providing the use of medication and perhaps psychiatric guidance could get him to accept this.

And this is the area in which I have some doubts.

I'm not saying that it's not possible, but I have some doubts that this patient will be amendable to this sort of thing.

I haven't talked with him since February, so I don't know what has happened since then.

THE DEPUTY COMMISSIONER: In other words, it is your opinion, Doctor, that the likelihood of his showing any improvement in his present symptoms is rather remote?

THE WITNESS: If nothing else is done, yes.

If he experiences psychiatric therapy and perhaps the use of medication which might be both of a physically-oriented nature and a psychiatrically-oriented nature, there is the chance that he could be restored to employment. And I think this would really be the psychiatrists' determination whether it is feasible or not.

I think physically he should be able to work. I think [fol. 31] work would be helpful to him. I think he's capable of this if he would be able to accept this as part of a general therapeutic rehabilitative program.

THE DEPUTY COMMISSIONER: I see.

All right, Mr. O'Malley.

BY MR. O'MALLEY:

Q Doctor, as a neurologist you have made a determination that the principal condition you saw in this man in 1963 was a mild concussion.

Is that correct?

A Yes.

Q And secondarily you saw a scar.

A Yes.

Q And as a tertiary you saw a marked anxiety reaction.

Is that correct?

A Yes.

Q Now, subsequently, Doctor, I believe you told us that he was either unable or unwilling to work. And it is my recollection that you indicated that you were not sure whether he was unable or unwilling.

Is that correct?

A This may be correct. If I wrote it down—Is this from a report?

Q No. You testified to that orally earlier.

[fol. 32] A I'm not sure if I used those words. But this basically could be true.

Q And with the history and all that you have—And I really don't want to get into an argument about it—But in this particular context I can see that if a man is unwilling to work, it is vastly different in our context than "unable" to work. The claimant may psychiatrically or emotionally be unable to work.

Do you understand what I mean?

A Yes, I understand what you mean.

And I think you may have misunderstood the meaning—If I used the term "unwilling," you might have misunderstood what I meant by unwilling, because I think that we are talking about basically the same thing.

When I said "unwilling," I was not meaning flatly refusing to accept a work responsibility that was possible for him.

If I said "unwilling," I had in mind unwilling to accept the fact that he was physically able to work, unwilling in the sense of accepting the diagnosis of the many doctors that he has seen that his injury is not responsible for all his problems; unwilling to accept the fact that nobody can find anything physically wrong with him; unwilling to accept the fact that perhaps a return to work [fol. 33] might be beneficial to him and it might be within his capabilities to do this and suffer no worse as a result of it and possibly even improve.

I didn't mean it as unwilling in the sense of refusing, but unwilling to be able to have the insight to see the meaning of the many medical advisers that have been in contact with him.

Q But you have indicated, I think, that since we are dealing with the emotions, it is more peculiarly the field of the psychiatrist both as regards diagnosis and treatment?

A I think basically this is true, yes.

Q Okay.

And as I also understand, the only distinction you have seen in this man prior to the accident of October '62 and subsequently is the fact that he has not worked and has not desired or been willing or wanted to work subsequent to October of '62.

A The only difference that I see, not having seen him prior to this 1963 examination, from a historical point of view is that he was employed previously and he is not employed at this time, for whatever the reasons may be psychiatrically at this time.

I think the same basic personality disorder he had prior exists at this time.

[fol. 34] Q Do you think the compensation factor has anything to do with it?

A I honestly don't know. It would be hard for me to say that it has nothing to do with it, because I think that would be impossible to state.

Even if he were a man of means, I think it has something to do with it. But I have more the feeling that right from the beginning of this man's convalescence, when perhaps thoughts of recovery should have been—physical recovery—should have been paramount rather than any other kind of recovery, he showed the same general kinds of responses.

And so I would have to answer that by saying that it probably plays some measure of a role. But I think that his personality disorder which pre-existed the injury was the prime determining factor for his failure to be employed at this time, and that the return to mental health and employability and general rehabilitation, from my point of view, would lie in the ability of the psychiatrist,

or in the ability of psychiatry, to assist him in being able to return and in accepting this.

Q That's all I have.

Thank you, Doctor.

THE DEPUTY COMISSIONER: Mr. Smith, do you have anything further of the Doctor?

[fol. 35] MR. SMITH: No.

THE DEPUTY COMMISSIONER: Thank you, Doctor. You may be excused.

THE WITNESS: Thank you.

(Witness Excused.)

MR. SMITH: I would like to call Mr. McClanahan.

MR. O'MALLEY: If I may—And possibly prior to that, if I could discuss my objections to the claim, you know, by virtue of the prior settlement—I don't care whether you have Mr. McClanahan in or out for that.

THE DEPUTY COMMISSIONER: Well, you can call the claimant in.

MR. SMITH: I would just as soon—It doesn't make any difference to me.

THE DEPUTY COMMISSIONER: Do you want to go off the record for a minute?

MR. SMITH: Sure.

(Discussion off the record.)

THE DEPUTY COMMISSIONER: Let's go back on the record.

The discussion here was the respondents' objection to any additional compensation on the grounds that a settlement has been made with the third party.

[fol. 36] Mr. O'Malley, would you go ahead.

MR. O'MALLEY: Yes, sir.

Mr. Commissioner, I would at this time ask to introduce into evidence as the Carrier's Exhibit Number One—

THE DEPUTY COMMISSIONER: We'll mark this Respondents' Exhibit Number One.

MR. O'MALLEY: Thank you.

And it is entitled Consent Judgment and bears the signature of Judge Youngdahl under date of March 3rd, 1967.

It is the position of the respondents that that Consent Judgment, which was predicated upon a complaint by the

claimant against the employer, the same claimant and the same employer we have in the Workmen's Compensation hearing before you, that that settlement by the claimant without the prior written consent of the carrier precludes that claimant from any further award under the Workmen's Compensation Act.

Our contention we feel is dictated, if not controlled, by the case of Marlin, M-a-r-l-i-n, versus Cardillo, C-a-r-d-i-l-l-o, Deputy Commissioner, decided January 10, 1938, and reported at 95, Fed Second, 112. Also at 68, Appeals, D.C., 201.

And the facts are in that particular case that the [fol. 37] claimant Marlin had settled a case which was in the courts, a claim predicated upon negligence, had settled that case with the defendant without the prior consent of the carrier. And our Court of Appeals held that that settlement precluded further recovery under the Workmen's Compensation Act.

THE DEPUTY COMMISSIONER: Do you wish to introduce this as evidence and mark it as Respondents' Exhibit Number One?

MR. O'MALLEY: Yes, sir.

(The document referred to was marked Respondents' Exhibit A for identification and received into evidence.)

That is our position.

MR. SMITH: Just for the record, I just wish to say that I think that a consent judgment is not the same as a compromise, which they were referring to in the Longshoremen's Act, that this is more similar to a remittitur.

THE DEPUTY COMMISSIONER: Shall we go off the record.

(Discussion off the record.)

Back on the record.

This hearing is now adjourned until further notice by the parties.

(Whereupon, the hearing in the above-entitled matter [fol. 38] was adjourned at 11:49 o'clock a.m.)

Deputy Commissioner's Exhibit No. 1

39

BUDGET BUREAU NUMBER 44-R1272

U.S. DEPARTMENT OF LABOR — BUREAU OF EMPLOYEES' COMPENSATION

EMPLOYEE'S CLAIM FOR COMPENSATION

SEE INSTRUCTIONS ON REVERSE

1. BEC CASE NUMBER

2. CARRIER'S NUMBER

3. NAME OF INJ... FIRST NAME: Alexander | MIDDLE INITIAL: | LAST NAME: McClanahan

4. DATE OF INJURY: 10/19/62

4a. ADDRESS (Number, street, city, State, zip code): ...auer & Hartzell, 2nd St., S. W., Washington, D. C., 20005

5. ☐ SINGLE ☒ MARRIED

5a. ☐ MALE ☐ FEMALE

6. AGE OR DATE OF BIRTH: March 21, 1922

7. SOCIAL SECURITY NUMBER: 235 28 0381

8. DID INJURY CAUSE LOSS OF TIME BEYOND DAY OR SHIFT OF ACCIDENT? ☐ YES ☐

8a. ☐ YES

9. HOUR BEGAN WORK: about 7 A. M.

9a. HOUR OF ACCIDENT: about 9 A. M.

9b. DID YOU STOP WORK IMMEDIATELY? ☒ YES ☐ NO

12. DATE AND HOUR PAID: 10/19/62

10. DATE AND HOUR YOU RETURNED TO WORK: not returned.

11. OCCUPATION (Job title, lumberjack, welder, etc.): Laborer

13. NUMBER OF YEARS IN THIS OCCUPATION: 3 years

14. EARNINGS: a. WEEKLY (Time allowed ...): $134.00+

b. TOTAL EARNINGS FOR PREVIOUS YEAR: $5800 in nine months

15. INJURED WHILE DOING SUCH WORK? ☒ YES ☐ NO (If "No," explain in Item 24)

15a. ANY HOURS YOU WORKED THIS EVENING: about 3

16. NUMBER OF DAYS USUALLY WORKED PER WEEK: 7

20. NAME OF FOREMAN OR SUPERVISOR AT TIME OF ACCIDENT: William Price

21. EARLIEST DATE FOREMAN OR EMPLOYER KNEW OF ACCIDENT: At Once

22. WERE YOU EMPLOYED ELSEWHERE DURING THE WEEK YOU WERE INJURED? ☐ YES ☒ NO (If "Yes," on reverse state where and when)

17. EXACT PLACE WHERE ACCIDENT OCCURRED (Street address, city, town. Name of vessel, pier, terminal, etc.)

1700 K Street, N. W., Washington, D. C. at a construction site.

18. EXPLAIN HOW THE ACCIDENT OCCURRED (Relate the events which resulted in the injury or occupational disease. Tell what the employee was doing at the time of the accident. Tell what happened and how it happened. Name any objects or substances involved and tell how they were involved. Give full details on all factors which led or contributed to the accident. If more space is needed, continue on other side.)

Claimant was ordered to return into a hole and dig some more since it did not pass inspection. Steel bars for cement pouring had already been put in. While digging the steel bars fell on claimant's head causing the injury.

19. NATURE OF INJURY (Name part of body affected—fractured leg, bruised right thumb, etc. If there was a loss of a part of the body, describe.)

Laceration of scalp, cerebral concussion and the aggravation of a pre-existing psychoneurosis.

23. HAVE YOU RECEIVED MEDICAL ATTENTION FOR THIS INJURY? ☒ YES ☐ NO (If "YES" give name and address of doctor, clinic, hospital, etc.)

All this information is in the existing file. Initial treatment was provided at Washington Hospital Center. These bills have already been paid by the carrier.

24. WAS SUCH TREATMENT PROVIDED BY EMPLOYER? ☒ YES ☐ NO

25. ARE YOU STILL DISABLED ON ACCOUNT OF THIS INJURY? ☒ YES ☐ NO

25a. HAVE YOU DONE ANY WORK DURING THE PERIOD OF DISABILITY? ☐ YES ☒ NO

26. HAVE YOU RECEIVED ANY WAGES SINCE BECOMING DISABLED? ☐ YES ☒ NO (If "Yes," give dates on back)

31. HAS INJURY RESULTED IN PERMANENT DISABILITY OR AMPUTATION? ☒ YES ☐ NO (If "Yes," describe on reverse)

32. NAME OF EMPLOYER (Individual or firm name): Morauer & Hartzell

33. NATURE OF EMPLOYER'S BUSINESS: Construction

32a. ADDRESS OF EMPLOYER (Number, street, city, State, zip code): 1620 2nd St., S. W., Washington, D.C.

35. IF ACCIDENT OCCURRED OUTSIDE THE U.S., STATE WHETHER YOU ARE U.S. CITIZEN ☐ YES ☐ NO

36. SIGNATURE OF PERSON CLAIMING COMPENSATION: Alexander McClanahan

37. DATE OF THIS REPORT: 7.26.1967

...1962 Edition of March 1961 may be used.

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21. Claimant suffers from dizzy spells and extreme nervousness and is unable to work. He suffers from great anxiety and tension causing headaches, tremors, dizziness, fainting. The injury in aggravating a pre-existing personality instability caused a psychoneurotic dependancy reaction. This impairment has permanently impaired his earning capacity.

BEST AVAILABLE COPY

[fol. 46] U. S. DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION

Docket No. 5966-244

ALEXANDER MCCLANAHAN, CLAIMANT

v.

MORAUER & HARTZELL, INC., EMPLOYER,

LIBERTY MUTUAL INSURANCE COMPANY,
INSURANCE CARRIER

Vanguard Building
1111 20th Street, N. W.
Washington, D. C.
Tuesday, May 28, 1968

The above-entitled matter came on for hearing, pursuant to notice, at 10:07 o'clock a.m.

BEFORE:

THE HONORABLE E. D. WOODWORTH, Deputy Commissioner

APPEARANCES:

For the Claimant:

JOHN L. SMITH, ESQ., Suite 850 Washington Building, 15th Street and New York Avenue, N. W., Washington, D. C. 20005

For the Respondents:

MACLEAY, LYNCH, BERNARD & GREGG, By: JAMES C. GREGG, ESQ., 1625 K Street, N. W., Washington, D. C.

[fol. 47]

INDEX

WITNESS:	*DIRECT*	*CROSS*	*REDIRECT*	*RECROSS*
John F. Mahoney, Jr.	49	50	50, 53	51, 54
Alexander McClanahan	59	60		

EXHIBITS

	RECEIVED	*APPEARS*
Respondents' Exhibit B (Letter dated 8/22/67 from Law Offices of Ritz & Smith to Liberty Mutual Insurance Co.)	69	71

[fol. 48] PROCEEDINGS

THE DEPUTY COMMISSIONER: Let the record show that this hearing began at 10:07 a.m. and that it is a continuation of the hearing held on December 11th 1967 in the matter of Alexander McClanahan versus Morauer & Hartzell, Incorporated.

All right, Mr. Smith, this continuation is being held to determine the matter of the third party settlement or the disposition, rather, that was made before Judge Youngdahl, I believe.

MR. SMITH: Yes.

THE DEPUTY COMMISSIONER: Are you ready to present your witnesses at this time?

MR. SMITH: Yes, I am. I have Mr. Mahoney.

Whereupon.

JOHN F. MAHONEY, JR.

was called as a witness by and on behalf of the claimant and, having first been duly sworn by the Deputy Commissioner, was examined and testified as follows:

THE DEPUTY COMMISSIONER: Would you be seated and give your full name and address to the Reporter, please.

THE WITNESS: I am John F. Mahoney, Jr., 734 Lawton Street, L-a-w-t-o-n, McLean, Virginia.

THE DEPUTY COMMISSIONER: All right, Mr. Smith.

[fol. 49] DIRECT EXAMINATION

BY MR. SMITH:

Q Mr. Mahoney, referring you to the day that we were in court regarding Mr. McClanahan's lawsuit against your client Gains, would you state for the record here, first of all, did we meet in Judge Youngdahl's Chambers?

A Yes, last February.

Q Right.

Will you state for the record here what transpired in Judge Youngdahl's Chambers?

A After this case was called for trial before Judge Youngdahl, we met in his Chambers and settlement was discussed.

As I recall, it was done in his usual manner, that he discussed the settlement with both of us first and then I believe I left the room and settlement was discussed with you and then I was called back in and you left the room and our figures were discussed then.

As a result of the conference, an agreement was reached at $5,000.

Q Thank you.

Do you know who first came up with that figure?

A I don't know whether I was asked what I evaluated the case at but I know at some time during the discussion Judge Youngdahl felt that the case was worth $5,000.

[fol. 50] Q Do you recall whether or not I was present when he gave you this figure?

A You were present.

MR. SMITH: I have no further questions, Your Honor.

THE DEPUTY COMMISSIONER: Mr. Gregg, you may cross-examine the witness.

CROSS EXAMINATION

BY MR. GREGG:

Q In other words, Mr. Mahoney, Mr. McClanahan's case was settled for the sum of $5,000?

A That's correct.

Q And on behalf of your company or your company did pay $5,000 either to or on behalf of the claimant in the case?

A That's correct.

MR. GREGG: I have no further questions.

REDIRECT EXAMINATION

BY MR. SMITH:

Q There was a consent order entered into, is that correct?

A Yes, a consent judgment.
Q Do you recall the terms of that?
A 3,000 for payment to Mrs. McClanahan and 2,000 to Mr. McClanahan.
[fol. 51] These were entered a day or two after the hearing.
Q Right.
Did you participate in that?
A No.
MR. SMITH: I have no further questions.
MR. GREGG: One other question, if I might.
THE DEPUTY COMMISSIONER: Certainly.

RECROSS EXAMINATION

BY MR. GREGG:

Q During this conference, this settlement conference in Judge Youngdahl's Chambers, was a representative of Liberty Mutual or Mr. McClanahan's employer present?
A No.
Q At any time did you ever see a written consent to this settlement executed either by the employer of Mr. McClanahan or by Liberty Mutual Insurance Company?
MR. SMITH: I'll so stipulate that there was no such.
THE WITNESS: No.
MR. GREGG: That is there was no written consent to the settlement. Will you also stipulate that there was no consent, period, to the settlement by Liberty Mutual Insurance Company?
MR. SMITH: Uh-huh.
MR. GREGG: Is that true?
MR. SMITH: Yes.
MR. GREGG: Will you also stipulate that no notice [fol. 52] was given to Liberty Mutual of the proposed terms or of the settlement prior to the time it was executed by your client?
MR. SMITH: Yes.
THE DEPUTY COMMISSIONER: Actually, what we are trying to determine here is whether this was an amount reached by the determination of the Judge or was it just a settlement agreed on by the parties.

Now we have this decision on, which you gentlemen are no doubt familiar with, Banks versus Chicago Grain Trimers Association, United States Supreme Court Docket 50 October Term 1967 decided April 1st, 1968, which was under the Longshoreman and Harbor Worker's Act in the Chicago Circuit where the Supreme Court held:

That if a determination is made by a trial judge and a valuation placed, it is judgment within Section 33-G of the Compensation Act.

That is what we are trying to determine here today is whether or not the judge entered into an evaluation of this so-called disposition of third party.

Could you tell us, Mr. Mahoney, was there any discussion between the parties without the presence of the judge?

THE WITNESS: I don't believe so. I believe all of the settlement discussions took place either between the judge and the plaintiff's attorney or the judge and myself [fol. 53] or the judge and both of us present and there was a hearing following the informal conference in Chambers in open court in which Mr. McClanahan was asked whether he was aware of the terms of settlement and was he satisfied with the terms of settlement and whether he realized that it would be a final settelment and he said yes.

THE DEPUTY COMMISSIONER: Then what transpired in the court in the proceedings?

THE WITNESS: He said, Yes.

THE DEPUTY COMMISSIONER: Was this in the Judge's Chambers?

THE WITNESS: This was in court, in the presence of a court reporter.

THE DEPUTY COMMISSIONER: In the presence of the court reporter.

FURTHER REDIRECT EXAMINATION

BY MR. SMITH:

Q Would you also state at that time whether there was any mention made of Workmen's Compensation by Judge Youngdahl?

A There was. I don't recall his exact words but they were to the effect that he felt this was a compensation case. That's all I can say.

THE DEPUTY COMMISSIONER: Any further questions, Mr. Gregg?

[fol. 54] FURTHER RECROSS EXAMINATION

BY MR. GREGG:

Q Mr. Mahoney, you have had several cases come up for trial before Judge Youngdahl, have you not?

A Yes, sir.

Q And there were, of course, occasions where a consent judgment was entered into as a result of the settlement conference in chambers?

A That's correct.

Q Primarily where the plaintiff is an enfant?

A (Nodding head.)

Q Is that right?

A That's correct.

Q Otherwise, generally speaking, a praecipe is merely entering the case as settled and dismissed with prejudice. Is that right?

A That's true, unless there is a—

Q Was there any discussion between the plaintiff's lawyer and the judge that this consent judgment was necessary in order to eliminate the Workmen's Compensation carrier's interest in the case or to provide a means of avoiding the settlement provisions under the Workmen's Compensation Act?

A No, sir.

Q Then why was it that with an adult plaintiff a [fol. 55] consent judgment was entered into in this case when there was no real trial on the merits?

A For the protection of all concerned. It was felt that this consent judgment should be entered into.

Q For the protection, meaning the protection against the ramifications of the Workmen's Compensation Act?

A No, all concerned, which would be the plaintiff and the attorneys involved. Mr. McClanahan had had several attorneys and he had also been under psychiatric care.

Q You are implying then perhaps Mr. McClanahan would not have abided by the settlement without a consent judgment?
A No, I don't imply that.
Q But there was no trial on the merits?
A No trial on the merits.
Q No testimony was offered?
A (Shaking head.)
Q Is that right?
A That's correct.
Q No jury was impanelled?
A That's correct.
Q No verdict was rendered?
A No.
Q And the discussions that were had had to do with a settlement of the case rather than an adjudication of the case in the sense of a trial of the facts and of the [fol. 56] issues involved?
A That's correct.
Q And Judge Youngdahl bandied several figures around.
A Right.
Q Between you and the plaintiff.
A (Nodding head.)
Q Is that right?
A Yes.
Q And finally arrived at a figure of $5,000 which represented a figure that was both agreeable to your client and also agreeable to the plaintiff's attorney and ultimately to the plaintiff.
A (Nodding head.)
Q Is that right?
A That's true. I'm not certain whether there was more than one figure mentioned. But there was an initial demand figure of $9,000 and, if I recall correctly, the only other figure that was mentioned after that time was $5,000 to which the parties agreed.
Q You indicated you would not pay any more on a settlement than $5,000?
A (No response.)
Q Is that right?

A No. I indicated that that figure was acceptable to me.

[fol. 57] Q And if the plaintiff had not accepted the settlement of $5,000, would you have offered more or were you authorized or can you tell us whether or not you were authorized at this stage to pay more than $5,000?

A $5,000 was generally my limit, the limit of my authority.

Q And if the case had not been settled in the area of approximately $5,000 you would have gone to trial.

Is that right?

A That's correct.

Q And taken your chance with the jury.

Is that right?

A If it was not settled generally within that area, that's correct.

MR. GREGG: I have no further questions.

THE DEPUTY COMMISSIONER: Mr. Smith.

MR. SMITH: Nothing further, Mr. Woodworth.

THE DEPUTY COMMISSIONER: You may be excused.

(Witness excused.)

Do we have any additional witnesses?

MR. SMITH: No one else participated in this except my partner who sat in with me but I have no one else who was present at the time of the negotiations.

THE DEPUTY COMMISSIONER: Do you think it might be well to take testimony from the claimant in this regard?

[fol. 58] MR. SMITH: I can.

THE DEPUTY COMMISSIONER: Would you come forward, Mr. McClanahan.

THE CLAIMANT: Pardon me, but do you mind if Mr. Mahoney stays here a minute? I would rather he'd hear this, if you don't mind.

I mean, I think it's vitally important that he does hear.

MR. SMITH: It's up to Mr. Mahoney.

THE DEPUTY COMMISSIONER: It's up to Mr. Mahoney.

MR. MAHONEY: What do you want me to hear?
THE CLAIMANT: The whole thing.
MR. SMITH: He's not a party, you know. He's only a witness, Alex.
THE DEPUTY COMMISSIONER: He is just a witness. This would have no regard for what you state in the case.

(Mr. Mahoney then departed the hearing room.)

Whereupon

ALEXANDER McCLANAHAN

the Claimant, was called as a witness in his own behalf and, having first been duly sworn by the Deputy Commissioner, was examined and testified as follows:

THE DEPUTY COMMISSIONER: Would you give the Reporter your full name and address, please.
THE WITNESS: Alexander McClanahan, 1836 D [fol. 59] Street, Northeast, Washington, D. C.
THE DEPUTY COMMISSIONER: All right, Mr. Smith.

DIRECT EXAMINATION

BY MR. SMITH:

Q Mr. McClanahan, were you present in the Judge's Chambers at the time we were discussing this settlement?
A No.
Q All right.
Would you relate to the Commissioner about what happened that day as far as you can recall it?
A I know you went, you and your assistant went back into the Chambers and you come out asking me to accept this $5,000. You said it wasn't a settlement and the judge had thought that it was a compensation case and if I would take the $5,000 you would see that I would get back on compensation.
And that was the impression that I had.
Q All right.
Did you agree in open court to accept this amount?
A After things were explained to me, yes, I did.
Q Would you state how you accepted it, you know, in open court?

A Judge Youngdahl said it wasn't a suit, that it was a compensation case and I could get back on the compensation and that's why I accepted but other than that I wouldn't have accepted it, because it wasn't anything to me.

[fol. 60] MR. SMITH: I have no other questions to ask him.

THE DEPUTY COMMISSIONER: Mr. Gregg.

CROSS EXAMINATION

BY MR. GREGG:

Q Do you recall whether you signed a release following this settlement?

A No, sir, I didn't sign no release.

Q Did you receive any money?

A My wife received it. What little bit was left for me the lawyer and the compensation got it.

Q Did you ever sit in the judge's chambers and discuss this matter with the judge?

A No, never.

Q The only discussion you had with the judge was in open court when he asked you if you were agreeable to the settlement? And you said yes.

A Yes, with the impression that I was to get on the compensation.

Q The judge asked you if you knew that your case was being settled for $5,000 and asked you if you agreed and you said yes.

Is that right?

A Well, sure I did. Still thinking—

Q But other than that, you did not testify before the judge?

[fol. 61] A No.

Q You didn't tell him about your accident?

A He didn't ask me about it.

Q Or your injuries?

A No.

Q And there was no jury present at the time you indicated to the Court that you were agreeable to the settlement of $5,000?

A. No.

MR. GREGG: I have no further questions.

THE DEPUTY COMMISSIONER: Mr. Smith.

MR. SMITH: I have nothing further, Mr. Woodworth.

THE DEPUTY COMMISSIONER: All right.

Mr. McClanahan, you received a gross amount of $2,000?

THE WITNESS: That's what I was supposed to have gotten on my part.

THE DEPUTY COMMISSIONER: And of that you paid $1,200 to the insurance company.

Is that right?

THE WITNESS: I think so. I don't know.

MR. GREGG: I'm not sure that that's so, Mr. Woodworth.

THE DEPUTY COMMISSIONER: Could we get clarification on those figures of what the claimant re- [fol. 62] ceived in net recovery? This is in his own right.

MR. SMITH: He received nothing in net recovery.

THE DEPUTY COMMISSIONER: I see; in other words, he was granted $2,000 of which part went for attorneys' fees and the remainder went to the insurance carrier, the employer and insurance carrier to reimburse them for his compensation?

MR. SMITH: That is correct.

THE DEPUTY COMMISSIONER: They have been paid.

MR. SMITH: That's correct.

MR. GREGG: Did they accept that?

MR. SMITH: The insurance company?

MR. GREGG: Yes.

MR. SMITH: Yes.

MR. GREGG: Are you sure about it?

MR. SMITH: That letter that you've got on the cover there is the letter that I sent them. You don't have a copy of the letter that they sent me?

MR. GREGG: What letter did they send you?

MR. SMITH: It was right after that. It actually was where—he accepted—You see, I gave him the check for $2,000.

MR. GREGG: Gave who?

MR. SMITH: One of the men up in your office, and he took it and gave me some sort of a note that, you [fol. 63] know, in the event the company in their main office refused to accept the $1200.00 the check would be returned.

BY MR. GREGG:

Q One other question. Your wife was not injured in this accident, was she?

A No.

Q She didn't incur any expenses for medical expenses for her own injuries or on her own behalf as a result of your accident?

Is that right?

A How is that now?

Q Your wife didn't incur any medical bills for any injuries that she sustained as a result of your accident for any expenses?

A No, no more than, you know, going to the doctor for her nerves.

Q And when you get money in your house both you and your wife spend it, is that right?

A Naturally.

Q So in other words, this money that was supposedly given to your wife was actually given to both you and your wife and you and your wife both used that money?

A It was given to my wife. You see, my wife didn't receive no injury and what she got hers was for my being hurt and what she had to contend with, my behavior and my reactions. That's what she got hers [fol. 64] for.

Because I mean, I would not have ever signed—I mean, it's like giving my life away for nothing. I didn't get anything and $3,000, I mean, it wouldn't even pay medical expenses.

Q But your wife did get $3,000?

A Sure, she got the money.

Q A net of $3,000.

A (Nodding head.)

Q Is that right?

A Close to it.
Q Which went into your bank account.
A I don't have a bank account.
Q Well, what you and your wife spend, let's put it that way.
A (No response.)
Q Is that right?
A Sure, it's right.

MR. GREGG: Now, Mr. Commissioner, the only things that we have are portions of our file which have to do with correspondence between—interoffice correspondence and a letter from Mr. Smith dated August 22nd, 1967, which we would like to also offer.

MR. SMITH: Could I see those, first?

(Examination of documents by counsel.)

[fol. 65] MR. GREGG: Do you have the stipulation agreement in the file? That's the key to this case.

THE DEPUTY COMMISSIONER: The consent order?

MR. GREGG: No, a stipulation that as of October 31, 1963 claimant was physically able to return to work with no loss of wage-earning capacity and requesting that an award be issued consistent with the terms of this stipulation agreement?

THE DEPUTY COMMISSIONER: I think not, Mr. Gregg.

MR. SMITH: That's your own, you know.

MR. GREGG: In your file, it should be in your file.

THE DEPUTY COMMISSIONER: You mean in the administrative file?

MR. GREGG: Yes.

THE DEPUTY COMMISSIONER: What is the date of that?

MR. GREGG: It doesn't seem to be dated.

THE DEPUTY COMMISSIONER: Could I see that, Mr. Gregg.

(Examination of document by The Deputy Commissioner.)

Yes, that is part of the administrative file from which the Compensation Order was filed on August 24, 1964 by Deputy Commissioner Herman Adler in which an award [fol. 66] was made for temporary total disability from October 20, 1962 to November 1, 1963, inclusive, 54 weeks at the maximum rate of $70 per week in the amount of $3,780.00.

MR. GREGG: Right.

MR. SMITH: Mr. Woodworth,—

THE DEPUTY COMMISSIONER: Yes.

MR. SMITH: —in regard to these interoffice memorandums I will object to their admission into evidence. We don't have an opportunity to cross-examine the people who made these statements and I don't think they are really relevant or admissible.

THE DEPUTY COMMISSIONER: At the beginning of the hearing held on December 1st, 1967, notations were made that stipulations were filed resulting in the compensation order being filed, which is in the record.

MR. SMITH: I don't object to that. I mean the interoffice memorandums which he has here which are correspondence back and forth between supervisors and employees at the company, you know, relative to phone conversations with my partner and with myself.

MR. GREGG: I might say that primarily they merely have to do with the fact that Liberty Mutual was claiming a lien on any recovery that might be effected in this suit.

MR. SMITH: I'll stipulate that but I object to their [fol. 67] admission as evidence.

THE DEPUTY COMMISSIONER: May I look at those?

(Examination of documents by The Deputy Commissioner.)

MR. GREGG: I think the reason we are submitting them is that we want to show those portions of our file that might have a bearing on this particular subject matter.

MR. SMITH: If that goes in, I would wish to see the whole file. There may be some stuff that is unfavorable.

MR. GREGG: I might say the rest of the file consists of medical reports and records showing payments, correspondence with the Commission, from the Commission, statements.

THE DEPUTY COMMISSIONER: Did you look at all of this Mr. Smith?

MR. SMITH: Yes, I read them over. I object to their admission on the general nature of them. I mean, it is not ordinarily done to admit memoranda like that back and forth without giving the other side an opportunity to cross-examine the people who are writing these memoranda.

MR. GREGG: I wasn't at the last hearing but I understood we were requested to provide copies of our file, or portions of our file that had to do with this.

MR. SMITH: I don't object to your reading them now but it seems to me if it goes into the file, the permanent file, it is rather prejudicial if somebody has this [fol. 68] case in the future who never had the opportunity to cross-examine anyone who wrote these things.

MR. GREGG: I think under those circumstances, Mr. Commissioner, I gather that one of the objections is that he doesn't want this information getting into the permanent file that might be reviewable by somebody other than you.

I would have no objection then to your merely reading them and returning them to me. In other words, considering them as having been read at the hearing.

MR. SMITH: They've been read.

MR. GREGG: I'm not saying there is anything particularly crucial in those.

MR. SMITH: I don't say there is anything particularly crucial either. I just don't—

MR. GREGG: The only thing really crucial I think is what is said there on the top, which I agree—

MR. SMITH: I think it's the same as me getting a message from Mahoney and bringing it up here and, you know, just having in there what I wanted.

THE DEPUTY COMMISSIONER: I agree. You may want to ask certain questions of Mr. Gregg regarding this or possibly Mr. Smith will agree to stipulate to these.

MR. GREGG: I think at least his letter there on the top should go into the file.

THE DEPUTY COMMISSIONER: I can't see any harm in that but possibly you might discuss it with Mr. [fol. 69] Smith.

MR. SMITH: It's all right with me.

THE DEPUTY COMMISSIONER: See if he'll agree.

MR. SMITH: It's all right. That can be admitted.

MR. GREGG: Your letter.

MR. SMITH: I recall it.

MR. GREGG: All right.

I think the other correspondence merely indicates that Liberty was claiming a lien on any recovery and merely is corroboration of the fact that they did not consent to any settlement and specifically the particular settlement here involved.

THE DEPUTY COMMISSIONER: Then you wish to admit that into evidence and mark it as an exhibit?

MR. GREGG: Yes, sir.

THE DEPUTY COMMISSIONER: Would you please mark this as Respondents' Exhibit B.

(The document above referred to was then marked as Respondents' Exhibit B for identification and was received into evidence.)

Shall we go off the record.

(Discussion off the record.)

Back on the record.

Let the record show that the parties intend to review their files and all medical reports and to advise this of- [fol. 70] fice at a later date what medical reports they will agree may be made a part of this record and to advise this office or the Deputy Commissioner if the hearing can then be closed.

Is that agreeable to everyone?

MR. SMITH: Yes.

MR. GREGG: Yes, sir.

THE DEPUTY COMMISSIONER: This hearing is now adjourned.

(Whereupon, the hearing in the above-entitled matter was adjourned at 10:48 o'clock a.m.)

RESPONDENT'S EXHIBIT NO. B

LAW OFFICES
RITZ & SMITH
Suite 850 Washington Building
15th St. & New York Ave., N. W.
Washington, D. C. 20005
MEtropolitan 8-6996

August 22, 1967

Liberty Mutual Insurance Co.
Attn: Mr. Myers
1730 M Street, N. W.
Washington, D. C.

Dear Mr. Myers:

This office has in its possession a check for $2,000 from Aetna Casualty and Surety Co. and made payable to Alexander McClanahan, this firm and your company. It is for a consent judgment awarded by Judge Luther Youngdahl in a third party claim filed by Mr. McClanahan against Morauer and Hartzell, (CA 1895-63).

Mr. McClanahan was represented by a number of different attorneys prior to the date of trial but when the case was finally certified for trial on February 20th, 1967, this firm was representing him.

On the morning of trial and shortly before convening Court the judge called with sides into his chambers for a conference with him which resulted in the defendant consenting to a judgment of $2,000 being entered against them in favor of Alexander McClanahan.

It is my understanding that you claim to have a lien against this judgment which is approximately twice its size. This office also claims an attorney's lien arising from a contract which the plaintiff executed when he retained us. It provides for a fee of 40% of the judgment and in the event further proceedings our necessary to collect this amount, 50%. It is believed by us that you

agree that you are entitled to the net of this judgment, that is that amount over and above counsel fees.

At an earlier date Mr. Ritz discussed this matter with you and at that time you stated that you could not do anything on the check because of attempts being made by Mr. McClanahan to obtain a modification of the award.

It is our wish to dispose of this matter and if we can not reach an agreement with you it will be necessary to file for a Declaratory Judgment. Therefore, we are willing to give you $1200 and we will take $800, such amounts being consistent with our respective liens. In the event that we are required to file for a Declaratory Judgement then we believe that under those circumstances we would be entitled to 50% pursuant to our agreement with Mr. McClanahan at the time of employment.

However, there does not seem to be any need for further litigation since we are awarding you the net amount of this check. I would be most happy to hear from you in the near future since I am anxious to dispose of this matter.

Very truly yours,

/s/ John Louis Smith, Jr.
JOHN LOUIS SMITH, JR.

LAW OFFICES
MACLEAY, LYNCH, BERNHARD & GREGG
Commonwealth Building
1625 K Street, N.W.
Washington, D. C. 20006

Telephone: 393-3390
Cable Address: Maclymac

June 5, 1968

E. D. Woodworth, Esquire
Deputy Commissioner
Bureau of Employees' Compensation
1111 - 20th Street, N. W.
Washington, D. C. 20211

Re: *McClanahan* vs. *Morauer & Hartzell*

Dear Mr. Woodworth:

In connection with the above matter, and the hearing held on May 28, 1967, we are enclosing a copy of Dr. Leon Yochelson's report of December 23, 1965, which claimant's attorney agreed could be received in evidence.

Insofar as the respondent and carrier are concerned, we have no further evidence to introduce.

We are therefore willing to stand on the evidence as introduced and ask that you consider the matters contained in the record as well as the memorandum attached.

Very truly yours,

/s/ James C. Gregg
JAMES C. GREGG

JCG:jej
encls

cc: John Louis Smith, Esquire

Mr. John Sidwar
Claim No. C360-122540

LAW OFFICES
RITZ & SMITH
Suite 850 Washington Building
15th St. & New York Ave., N.W.
Washington, D. C. 20005

MEtropolitan 8-6996

July 2, 1968

E. D. Woodworth, Deputy Commissioner
Bureau of Employees' Compensation
D.C. Workmen's Compensation Act
1111 Twentieth St., N. W.
Washington, D. C. 20211

File No. 5966-244
7
McClanahan v. Morauer & Hartzell, Inc.

Dear Mr. Woodworth:

Please be advised that the claimant has no objection to the admission of Dr. Yochelson's report of December 3, 1965 into the record.

Also, at this time I wish to advise you that we have no further evidence to offer in the matter.

Very truly yours,

/s/ John Louis Smith, Jr.
JOHN LOUIS SMITH, JR.

LEON YOCHELSON, M.D.
3000 Connecticut Avenue, N.W.
Washington, D. C.

December 23, 1965

John F. Mahoney, Jr., Esq.
925 Washington Building
Washington, D. C.

Dear Mr. Mahoney:

The following is the summary of a two hour psychiatric examination on December 18, 1965 of Mr. Alexander McClanahan of 1836 D Street, N.E., Washington, D. C. I have also had the opportunity of reviewing medical records pertaining to Mr. McClanahan by Dr. Jonathan M. Williams (dated November 9, 1962), Dr. Harold Stevens (dated December 10 1962), Dr. Sidney Green (dated December 13, 1962), Dr. Jerome M. Block (dated April 23 1963), Dr. Robert H. Groh (dated January 9 1964), resume of records of the U. S. Army Hospital, Huntington, West Virginia (admission of February 1944), resume of medical records of the VA Hospital, Roanoke, Virginia (admission of July 9 through August 11 1959), and Dr. Hyman D. Shapiro (dated October 25 1963).

Mr. McClanahan started the interview with a lengthy sullen: "I had to go to New York to get any help, here they treat you like a dog. They say I am faking. They treat me like a criminal. I can't get any consideration. It's pitiful. Dr. Block in New York said the bruise in my head could not get well overnight and that it would take some time for me to recover from shock and that eventully I would get better. But I have had no help, other than that. I have been a hard working man all my life, not depending on any one. Those (referring to doctors) who were not cruël said only that they would consult my lawyer." I inquired several times whom Mr. McClanahan had specifically in mind. However he would only generalize about "the doctors" and "the lawyers". He was critical of any diagnostic studies which had been

administered. He acknowledged having seen 3 or 4 psychiatrists in the Washington area in the past three years but stated he could not remember any of their names.

It took some effort to interrupt Mr. McClanahan's tirade in order to obtain more specific data from him. By dint many questions I learned that he feels "jittery in the morning, restless, have to walk or sit, head hurts, especially in the back, tension headaches also, sometimes vomit two or three times a month, somestimes no vomiting during a month, occasionally can't sleep, walk the floor or the street, can't stand noise, especially from children, curse them, losing weight—15 pounds in the last five or six months, now weigh only 160."

Despite Mr. McClanahan's previous several contacts with psychiatrists and his knowledge that a thorough discussion of his background was in order, he was spontaneous only when it came to the sullen monologue described earlier. Instead, numerous questions were necessary to get even the following history from him: He was born in Ridgeville, Ohio, March 21 1922. His father was killed by a bolt of lightning prior to his birth, following which his mother moved to West Virginia to be closer to her relatives. His mother remarried in about two years to Mr. Charles Coles. Mr. McClanahan has one full sister, three half sisters, and four half brothers, one half sister having died of tuberculosis at the age of 18 when Mr. McClanahan was in the army. He did not give a picture of the more subtle aspects of intrafamily and interpersonal relationships, saying only that he was his step-father's pet, attributing this to the fact that for a long time he was the only male child in the household. He did not elaborate upon the event of his mother's death from cancer when he was but fourteen years old, other than to engage in a few generalizations that of course one has some feelings over the death of a parent. He left school in the ninth grade and did odd jobs until the age of 18. Then he worked in a coal mine for three years. He was drafted into the army at the age of 20 on April 2 1942 and after basic training served in the ground air force and in a tank destroyer unit. He had

no overseas duties, and was discharged March 19 1943 with a Certificate of Disability Discharge for Psychoneurosis, Anxiety. He explained that he had suffered "blackouts". He had a special Court Martial and was sentenced to six months in the stockade for having been AWOL for 33 days. He had one Summary Court Martial for a misdemanor but stated he could not remember what it was for. He denied any other difficulty in military service.

Mr. McClanahan used his stepfather's name until his marriage at the age of 19 when, he added, he needed to use his correct name for legal papers and returned to his natural father's name. His first marriage continued for 13 years and produced two children. Mr. McClanahan stated that he divorced his wife in West Virginia because of his objection to the quality of his wife's too close relationship with other women. He married for the second time in 1955 from which he has 3 children ages 9, 7 and 4 years. He stated that this marriage had been an excellent one until his injury since when he has had "trouble with my wife, no feeling for her."

Mr. McClanahan related that upon his discharge from the army he returned to the coal mines of West Virginia where he worked steadily from 1943 to 1952 as a reader of scales. In 1952 he purchased a pool room which he maintained until 1959 when he sold out and moved to Washington. When I asked him what accounted for selling a lucrative business he then acknowledged that actually he left in 1958 because of a 15 month sentence in the Lewisburg Federal prisom for being involved in an illegal distillery operation. He stated that his only other brushes with the law involved a number of gambling fines, the exact or even approximate number he denied recalling. During this period he "occasionally drank vodka and gin", denying the use of any since his accident. He denied using unprescribed drugs. Upon moving to Washington he obtained work with some construction company affiliated with D. C. Transit for whom he worked for three to four months, then joined the Moore-Harfort (?) Company for whom he

worked steadily from 1959 to 1962. He stated first that he earned $200. a week, then changed this to $175. to $180. a week. To whatever questions were asked about his work history he qualified with statements that he always worked steadily, had good relationships with his employrs, that he always supported himself and was never dependent upon anyone.

In response to questions about mis medical history Mr. McClanahan stated that he had sustained a broken fourth right finger while working in a coal mine. In 1949 he was stabbed in the abdomen by a girlfriend and was treated at the Bluefield Sanitarium in West Virginia. In 1958 he went to the VA Roanoke Hospital and was surprised to find himself in the locked psychiatric ward. He stated that he originally went there because of a recurrence of "blackouts or fainting spells". He signed out against medical advice. He attributed his blackouts to the fact that ht had been gambling considerably and losing sleep since he maintained his pool room operation at this same time. "I would miss my rest and therefore I was tired and would faint. I had the last one in 1958 but there have been two since the injury" (of 1962).

Mr. McClanahan had very little to say about the accident to which he attributed all his difficulties. He stated that sometime around 8 or 8:30 a.m. of October 19, 1962 he was working on some footings in any excavation when he was struck unexpectedly on the head by some iron rods. He is certain he was unconscious, not "coming to" until he was out of the hole several hundred feet away. He was taken to the Washington Hospital Center where his lacerated scalp was sewn and where he received x-rays after which he was sent home. Since then he has felt unable to work because of the various symptoms outlined in the second paragraph of this letter. When I inquired as to what psychiatric treatments he had tried to get for his "nervous condition" he first returned to the subject of how no one (doctors and lawyers) treats him well and that they think he is faking. Finally he stated he went to visit the Washington D. C.

Mental Hygiene Clinic of the Veterans Administration on Constitution Avenue and received some medication from Dr. Woodson who advised him not to drive. This made little difference to him since he had lost his license anyway for speeding. He requested further studies of his head and he was referred to Dr. Korengold but he refused to see Dr. Korengold since the latter wanted to review all Mr. McClanahan's medical records.

Mr. McClanahan has a history both of periods of anxiety and of any unstable, inadequate and dependent personality. I have no evidence that his personality at this time is any different than what it had always been during his adult years and therefore conclude that there is no relationship between his complaints and the event of October 19, 1962.

Sincerely,

/s/ Leon Yochelson, M.D.

UNITED STATES DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION
DISTRICT OF COLUMBIA COMPENSATION DISTRICT

Case No. 5966-244

In the Matter of the Claim for Compensation Under the District of Columbia Workmen's Compensation Act

ALEXANDER MCCLANAHAN, CLAIMANT

MORAUER & HARTZELL, INC., EMPLOYER,

LIBERTY MUTUAL INSURANCE COMPANY, CARRIER.

MEMORANDUM

Claimant Alexander McClanahan has requested a modification in the award for compensation that he received on August 24, 1964. This award was the result of injuries he sustained on the job on October 19, 1962. Mr. McClanahan also filed a third party suit against Ray Gaines, Inc. This case was certified out for trial on February 20, 1967 to Judge Youngdahl. That morning the judge called counsel for both parties into his chambers in a last effort to settle it. He advised counsel that he had read the file over and from his years of experience had arrived at what he considered a fair evaluation of the claim. After discussions with counsel for both parties, separately and together, the judge's efforts resulted in the consent judgment which was based on his evaluation of the case. There was no written consent obtained from the carrier, Liberty Mutual Insurance Company, who were not participants in the negotiations with Judge Youngdahl. They are now defending this attempt to modify the award of 1964 on the basis of their not having consented to the consent judgment.

Marlin v. *Cardilla*, 95 F2 112, 68 US App DC, 201, holds that a settlement entered into between the claimant and the third party tort-feasor without the consent of the employer's insurer bars any further recovery

under the Act against the employer. It in fact bars any recovery against the employer. This is to assure that settlements prejudicial to the employer are not entered into giving rise to double recoveries. This rule has been recognized by other federal courts in causes arising under the Longshoreman & Harborworkers Compensation Act. But it has been subsequently cautioned that such a rule is not to be followed if it only serves to create forfeitures to the employees and windfalls to the insurers.

> "In the absence of language plainly demanding it, a construction is not to be favored which visits a forfeiture on the employee or his dependants and gives a windfall to the insurance carrier. The Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." *Bell* v. *O'Hearne*, 284 F2 777.

In the above cited case a widow sued the third party for death benefits and was awarded a judgment for $6,500. She settled this judgment for $5,000 and then went against the employer's carrier for the balance in a Workmans Compensation Claim. There had been no consent obtained from the insurer at the time of compromise. Judge Sobeloff then traced the history of the cases interpreting this section of the Act, 933(g) and pointed out that in this instant there was no prejudice to the insurer since there had been a judicial determination. In other words the fact that the case was later settled was not relevant; what mattered was that the damages were measured by means other than a figure reached independantly by the two parties.

> "Where, however, there has been a judicial determination of the damages, there is no possibility whatever of prejudice to the employer from the judgment creditor's consent to a dimunation in damages." *Bell* v. *O'Hearne*, supra.

This case is only spelling out more clearly the doctrine worded in *Chapman* v. *Hoage*, 296 US 526, 56 S

Ct 333. That case also arose in the District of Columbia ruling that the employer would have to show that he was prejudiced by the claimant's dropping of his suit against the third party tort-feasor without obtaining his consent. The Supreme Court reversed a decision in favor of the employer and found there to be no prejudice arising from the withdrawal of the suit.

The trend in other jurisdictions has also been to get away from the harsh affects arising from a strict interpretation of statutes requiring consent of employer on such settlements. New York's state workman's compensation act has a similar requirement. They have held:

> "The judgment, which claimant recovered in his third party action, represents the trial court's *evaluation* of the damages sustained and was not the result of any settlement *between the parties*. Hence, the carrier's consent was not required." *Klump* v. *Erie Co. Highway Dept.*, 91 NYS2 689, affirmed, 275 App Div 1017. [Emphasis added].

So also in the instant case the judgment recovered by the claimant is not the result of a settlement between the parties but it represents the evaluation of the damages by the judge who obtained the agreement of the respective counsel to settle. Therfore, since there is no prejudice arising from the settlement the request for modification of the workmans compensation claim should not be barred. To do otherwise would be giving a windfall to the insurance carrier and not be in conformance with the purpose of the statute.

Furthermore, on the matter of medical services which are needed by the claimant the claimant points out that such services are treated separately under the Act, sec. 7. There is a proviso making section 33(b) applicable here also but the proviso is limited to just that part of sec. 33. It is argued that if the other parts of section 33 were to be included Congress would not have specified only part (b). As a matter of fact of the $2,000 claimant. McClanahan received pursuant to the consent judgment $1,200 of it was turned over to the insurer

upon their demand. Therefore, there is no way that they can show themselves to be prejudiced by the settlement as far as the medical services are concerned.

Respectfully submitted,

/s/ John Louis Smith, Jr.
Attorney for claimant
850 Washington Bldg.
Washington, D. C.
638-6996

[Certificate of Service (Omitted in Printing)]

UNITED STATES DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION

DISTRICT OF COLUMBIA COMPENSATION DISTRICT

Case No. 5966-244

In the Matter of the Claim for Compensation Under the District of Columbia Workmen's Compensation Act

ALEXANDER MCCLANAHAN, CLAIMANT

MORAUER & HARTZELL, INC., EMPLOYER,

LIBERTY MUTUAL INSURANCE COMPANY, CARRIER

MEMORANDUM ON BEHALF OF EMPLOYER AND CARRIER

This matter is before the Commission at this time on claimant's application for a modification of an award, under Section 22 of the Act, on the ground of a change of condition. The formal application is on Form BEC-203, signed by the claimant and dated July 26, 1967.

There are three basic issues upon which the matter is submitted.

First; Is the application timely in view of the express requirement that an application to modify an award must be filed within one year of the date of last payment, and in an instance where the record reflects that pursuant to a prior award, dated August 14, 1964, the last payment was made to the claimant on August 24, 1964, and where the application was not filed until July 26, 1967, two years, eleven months and two days after last payment of compensation?

The employer and carrier respectfully submit that the answer must be in the negative.

Second; Does the record in this case, assuming that the application was filed within the statutory period, contain sufficient evidence to justify a modification of the prior award, where the only evidence on this point indicates that claimant's condition has not changed, except to improve, as testified to by Dr. Korengold?

Again, it is submitted, the answer is "No."

Third; Assuming again for the purpose of argument that the answer to the foregoing questions would be "Yes", does a settlement of a third-party claim in the Trial Court's chambers prior to trial, where the settlement was formally reduced to a "Consent Judgment" operate as a bar to further proceedings in the Commission under Section 33(g) of the Act.

In the context of the facts of this case, it is submitted that the compromise of the third-party claim, admittedly without notice to or with the written consent, or otherwise, of the employer or carrier bars further proceedings in this case.

The uncontradicted evidence before the Commission is to the effect that on the trial date of the third-party action, counsel reported to the chambers of Judge Youngdahl. At that time, the Court discussed settlement with counsel jointly and separately. Plaintiff's attorney demanded $10,000.00 and reduced it to $9,000.00. Defendant's attorney offered $5,000.00. The Court prevailed upon the plaintiff's attorney to accept the settlement subject to the consent of the plaintiff. Plaintiff then agreed to the settlement, and in open court stated that the figure of $5,000.00 was agreeable to him. A form of a "Consent Judgment" was subsequently prepared by the parties and submitted to the Court for entry on the record.

Many cases are settled in the judge's chambers prior to trial, as this one was. Generally, the parties merely file a praecipe noting the claim as dismissed with prejudice. Because of the nature of plaintiff's claimed injuries, and the fact that he had several attorneys representing him at various times, that he had discharged, a consent judgment was entered into solely for the protection of the parties. On its face, the judgment was a "Consent Judgment" to which the parties consented. It constituted only a compromise or settlement of the claim and purported to do no more.

It is significant that the trial was never convened, that a jury was never inpanelled, that no witnesses were sworn, that no testimony was given or evidence introduced and that the disputes of the parties were never

adjudicated. The court's evaluation of the case for settlement purposes, where many considerations such as the odds on recovery, the effect of contradicting testimony and medical evidence, etc., differs materially from evaluating the case from a point of view of a trier of the fact or a judge as to the law.

In the principal case cited by the claimant, *Bell* vs. *O'Hearne*, 284 F2d 777, plaintiff accepted $5,000.00 in payment on a judgment of $6,500.00. There was, in other words, "a judicial determination of the damages".

Similarly, in *Banks* vs. *Chicago Grain Trimmers*, decided by the U.S. Supreme Court on April 1, 1968, there was, after a trial, a verdict of $30,000.00 and a remittitur of $11,000.00 ordered by the trial court. Again, clearly, the court was adjudicating the damages. It can hardly be disputed that a remittitur is not a compromise.

And, as the Court said in both of the cited cases, if there is an adjudication, there is no possibility of prejudice resulting to the employer of the employer "accepting too little for his cause of action against the third-party."

In both cases, there was a trial and an adjudication based upon sworn testimony. A settlement in chambers, as was effected in this case, is clearly a compromise of the type contemplated by the Act as requiring the written consent of the employer.

Accordingly, on each of the three grounds cited, the claim should properly be dismissed.

MACLEAY, LYNCH,
BERNHARD & GREGG

By /s/ James C. Gregg
1625 K Street, N.W.
Washington, D. C. 20006
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Attorneys for Respondents

Certificate of Service

This is to certify that a copy of the foregoing was mailed, postage prepaid, this 5th day of June, 1968 to Jon Louis Smith. Jr., Esquire, attorney for claimant, 850 Washington Building, Washington, D. C.

/s/ James C. Gregg
JAMES C. GREGG

UNITED STATES DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION

DISTRICT OF COLUMBIA COMPENSATION DISTRICT

Case No. 5966-244

In the Matter of the Claim for Compensation Under the District of Columbia Workmen's Compensation Act

ALEXANDER MCCLANAHAN, CLAIMANT

vs.

MORAUER & HARTZELL, INC., EMPLOYER,

LIBERTY MUTUAL INSURANCE COMPANY,

INSURANCE CARRIER

COMPENSATION ORDER MODIFICATION OF AWARD

On August 24, 1964, a compensation order was filed in the above-entitled case awarding compensation to the claimant herein for temporary total disability at the maximum rate of $70 per week from October 20, 1962 to November 1, 1963, inclusive, 54 weeks in the amount of $3,780. The said order is made a part hereof by reference.

The claimant has filed application for modification of the award contained in the compensation order filed on August 24, 1964, on the ground of a change in conditions.

Such further investigation in respect to the said application having been made as is considered necessary, and hearings having been duly held in conformity with law, the Deputy Commissioner makes the following additional

FINDINGS OF FACT

1. That in compliance with the terms of the compensation order filed on August 24, 1964, the employer and the insurance carrier have paid to the claimant herein compensation for temporary total disability in

the amount of $3,780, representing all installments due him to and including November 1, 1963;

2. That on March 3, 1967, the claimant obtained a consent judgment in court against the third party responsible for the claimant's injury and received the gross sum of $2,000; that the expenses incurred by the claimant in connection with the third party action, including attorney fee and court costs, amounted to $800, leaving a net recovery of $1,200;

3. That as a result of the recovery by the claimant, the employer and insurance carrier requested reimbursement of compensation and medical expenses already paid; that the claimant remitted $1,200, the entire amount of the net third party recovery to the employer and insurance carrier;

4. That on July 26, 1967, the claimant filed claim against the employer and insurance carrier for additional compensation;

5. That the employer and insurance carrier objected to the claim on the grounds that the claimant obtained a compromise settlement of his claim for damages against the third party under section 33 (g) of the Act without the written approval of the employer and insurance carrier and that the claimant suffered no further disability as a result of the injury;

6. That the consent judgment filed on March 3, 1967, and signed by Judge Youngdahl, and co-signed by the attorney for the claimant and attorney for the defendant represented a judicial determination of the damages recoverable from the third party; that no compromise was effected thereby within the meaning of section 33 of the Act, thus, the written approval of the employer and insurance carrier was not required for such consent judgment;

7. That as a further result of the injury, the claimant continued to suffer from periodical headaches and discomfort and manifestations of aggravation of a preexisting anxiety reaction; that for such temporary partial disability he is entitled to 104-2/7 weeks' compensation based on a 25 per cent impairment of earning ca-

pacity at the rate of $22.33 per week (66-2/3 per cent of $33.50, the difference between $134, the average weekly wages at the time of injury, and reduced weekly earning capacity of $100.50) from November 2, 1963 to October 31, 1965, inclusive, in the amount of $2,328.70;

8. That as of November 1, 1965, the claimant's emotional and functional symptoms due to the injury terminated and his condition reverted to his status which existed immediately prior to the injury of October 19, 1962.

Upon the foregoing findings of fact, the Deputy Commissioner makes the following

AWARD

That the employer, Morauer & Hartzell, Inc., and the insurance carrier, Liberty Mutual Insurance Company, shall pay to the claimant, in addition to compensation paid for temporary total disability in the amount of $3,780, compensation for temporary partial disability, 104-2/7 weeks at the rate of $22.33 per week from November 2, 1963 to October 31, 1965, inclusive, in the amount of $2,328.70, which sum is due and payable forthwith.

A fee for legal services rendered the claimant in connection with this claim is approved in favor of John L. Smith, Jr., Esq., in the amount of $450, such sum to be a lien upon and paid out of this award.

Given under my hand and filed at Washington, D. C. this twelfth day of August, 1968.

/s/ E. D. Woodworth
Deputy Commissioner
District of Columbia
Compensation District

[Proof of Service (Omitted in Printing)]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2270-68

[Filed Mar. 4, 1969, Robert M. Stearns, Clerk.]

MORAUER & HARTZELL, INC.

and

LIBERTY MUTUAL INSURANCE COMPANY, PLAINTIFFS

vs.

E. D. WOODWORTH, Deputy Commissioner, DEFENDANT,

ALEXANDER MCCLANAHAN, INTERVENING DEFENDANT

ANSWER

Comes now the intervening defendant, Alexander McClanahan, by and through his attorneys, John Louis Smith, Jr. and Charles B. D. DeShazo, and for answer to the Complaint states as follows:

1. Admits the allegations contained in Paragraphs one, two and three.

2. Denies the allegations in Paragraph four except as to admit that intervening defendant was, by Order dated August 24, 1964, awarded compensation for temporary total disability resulting from an injury on October 19, 1962 and that said amount was paid; that intervening defendant did file a third party suit described as CA 1895-63; that on July 31, 1967 intervening defendant filed a claim applying for a modification of the Order of August 24, 1964; that defendant, Deputy Commissioner, by Order dated August 12, 1968, granted intervening defendant's application in the form of an award for temporary partial disability.

3. Denies allegations contained in Paragraph five except as to admit that defendant acted without basis of law or fact in granting temporary partial disability when in fact the evidence adduced at the hearing showed that intervening defendant was totally disabled.

WHEREFORE, intervening defendant prays that the complaint be dismissed.

COUNTER-CLAIM AND CROSS-CLAIM

1. Intervening defendant in his counter-claim and cross-claim alleges the following:

1. That pursuant to intervening defendant's application for review filed on July 31, 1967 referred to in Paragraph IV of plaintiff's complaint, a hearing was held before defendant at which it was determined that intervening defendant should be compensated for temporary partial disability (25% impaired) for the period from November 2, 1963 to October 31, 1965.

2. The findings in said compensation order are contrary to the evidence in the case and are not supported by the evidence.

3. The compensation Order is contrary to the law and the facts in the cause.

4. The intervening defendant has never recovered from the effects of the accidental injury; that he was never discharged by any attending physician as being cured or as having reached maximum degree of recovery; that no attending physician has reported that the intervening defendant was able to return to work; that the intervening defendant was totally disabled on November 2, 1963 and has been continuously up to and including the date of this claim.

WHEREFORE, intervening defendant prays that this Court refer back to the Bureau of Employees Compensation the proceedings in this cause with an Order directing said Bureau to modify its award to provide that the intervening defendant be awarded compensation for total disability from November 2nd, 1963 to date.

/s/ John Louis Smith, Jr.
850 Washington Bldg.
638-6996

/s/ Charles B. DeShazo
Southern Building
Na 8-2145

[Certificate of Service (Omitted in Printing)]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C. A. No. 2270-68

[Filed Nov. 17, 1969, James F. Davey, Clerk.]

MORAUER & HARTZELL, INC.

and

LIBERTY MUTUAL INSURANCE COMPANY, PLAINTIFFS

vs.

E. D. WOODWORTH, Deputy Commissioner

and

ALEXANDER MCCLANAHAN, DEFENDANTS

ORDER

The above matter having come on for hearing upon plaintiffs' Motion for Summary Judgment, upon defendants' Motion for Summary Judgment, and upon the intervenor's Motion for Summary Judgment, and after argument thereon by counsel for the parties in open court, and after consideration of the record herein, the parties' memoranda filed in support of their respective motions and the Statement of Facts that are not in dispute, the Court concludes that there is no genuine issue of material fact with respect to the "Consent Judgment" that was entered in Civil Action No. 1895-63 on March 3, 1967, that said judgment was entered for the purpose of confirming a compromise or settlement, that plaintiffs had not given their prior written approval to said settlement, and that additional compensation was therefore barred by the provisions of Section 33 (g) of the Longshoremen's and Harbor Workers' Compensation Act, Title 33, U. S. C., Section 933 (g) as made applicable to the District of Columbia, and it is therefore this 17th day of November, 1969,

ORDERED, that plaintiffs Morauer & Hartzell, Inc. and Liberty Mutual Insurance Company's Motion for Summary Judgment be and it hereby is granted, that defendant E. D. Woodworth's Motion for Summary Judgment be and it hereby is denied, and that intervenor Alexander McClanahan's Motion for Summary Judgment be and it hereby is denied, and that judgment be and it hereby is entered in favor of the plaintiffs, Morauer & Hartzell, Inc. and Liberty Mutual Insurance Company against the defendant J. D. Woodworth, and further that judgment be and it hereby is entered in favor of the plaintiffs Morauer & Hartzell, Inc. and Liberty Mutual Insurance Company against the defendant Alexander McClanahan on the Intervenor's Complaint.

/s/ George L. Hart, Jr.
Judge

[Certificate of Service (Omitted in Printing)]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,945

MORAUER & HARTZELL, INC., ET AL.

v.

E. D. WOODWORTH, DEPUTY COMMISSIONER,
BUREAU OF EMPLOYEES COMPENSATION

ALEXANDER MCCLANAHAN, APPELLANT

Appeal from the United States District Court
for the District of Columbia

Decided December 30, 1970

Mr. John Louis Smith, Jr., with whom *Mr. Charles DeShazo* was on the brief, for appellant.

Mr. James F. Bromley with whom *Mr. James C. Gregg* was on the brief, for appellees.

Before MCGOWAN, MACKINNON and ROBB,
Circuit Judges

PER CURIAM: This appeal raises a question of statutory interpretation under Section 933(g) of the Longshoremen's & Harborworkers' Act, 33 U.S.C. § 933(g) (Supp. V, 1970).

Appellant suffered an injury while at his place of employment in 1962, and filed a claim with the Bureau of Employees' Compensation. On August 24, 1964, the Bureau, upon a finding that the injury had caused temporary total disability, ordered appellees (the employer and its insurance carrier) to make compensation payments totaling $3,780.00. While the claim was pending before the Bureau, appellant filed a civil action in the

District Court against a third party, alleging that the conduct of its employees had contributed to the same injury. The case was set for trial on February 20, 1967. On that date counsel for appellant and the third party were called into chambers by the trial judge to discuss settlement. Following his usual practice in exploring settlement possibilities in civil matters, the judge first conferred with both attorneys together and then spoke privately with each one. It appears that at some point during these discussions the judge suggested that, having reviewed the file, the claim seemed to him to be worth $5,000.00. Although other figures were apparently also considered, the parties finally settled on the $5,000.00 figure, and on March 3, 1967, a consent judgment for that amount was entered. Appellant's wife received $3,000.00 and appellant received $2,000.00. Attorney's fees consumed $800.00 of appellant's share and the remaining $1,200.00 was turned over to the employer and its insurer as partial reimbursement for the disability payment made to appellant under the compensation order of August 24, 1964.[1]

Subsequently, appellant filed with the Bureau a claim for modification of the 1964 compensation award, alleging that his injury had proved more serious and of longer duration than had been anticipated. Although the Deputy Commissioner did not find a disability to the extent alleged by appellant, he did order a modification of the award based on a finding of temporary partial disability for a period of approximately two years following the period of total disability covered by the former award. The modification added $2,328.70 to appellant's total compensation award.

Appellees challenged the modification in the District Court, and appellant intervened as a party defendant. Appellees' primary contention was that the Deputy Commissioner was barred from granting any further compensation by Section 933(g), which states that,

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[1] The remittance of an amount equal to the amount recovered from a third party is required by Section 933(f) since the employer is only responsible to pay compensation for the excess over what any third party must pay. 33 U.S.C. § 933(f) (1964).

> "If compromise with such third person is made by the person entitled to compensation . . . of an amount less than the compensation to which such person . . . would be entitled . . . *the employer shall be liable for compensation as determined in subdivision (f) of this section only if such compromise is made with his written approval.*"

33 U.S.C. § 933(g) (Supp. V, 1970) (emphasis supplied). Appellees argued that the consent judgment appellant obtained against the third-party tortfeasor was a "compromise" within the meaning of the statute and that, since appellant had stipulated that no written approval was secured, he was precluded from further recovery. The Deputy Commissioner, however, had determined that the consent judgment, formalizing and implementing the parties' settlement agreement, was not a "compromise" within Section 933(g), but was rather the product of what he termed a "judicial determination of the damages recoverable from the third party." Therefore, so the Deputy Commissioner concluded, Section 933(g) was not applicable, and no written consent by the employer was required.

On cross-motions for summary judgment, the District Court ruled, in agreement with appellees, that the consent judgment "was entered for the purpose of confirming a compromise," and that appellant was, therefore, barred from obtaining additional compensation.[2] Appellant's challenge to this grant of summary judgment forms the basis of this appeal.

Under the Longshoremen's & Harborworkers' Act, an employee may be entitled to compensation from his em-

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[2] Appellant, in addition to his unsuccessful cross-motion for summary judgment on the Section 933(g) issue, filed another motion for summary judgment, contending that the Deputy Commissioner's finding of temporary partial disability was unsupported by substantial evidence and that the District Court should overturn that finding and replace it with a finding of permanent total disability. The court, having found appellant not entitled to any further compensation on the Section 933(g) ground, was not required to deal with the merits. Our concurrence in the District Court's holding eliminates this issue from our consideration as well.

ployer and also to recover damages against any third person for the same injury. Section 933(f) stipulates, however, that the employer is only responsible for the difference between the total compensation award as computed by the Bureau of Unemployment Compensation, and the amount recovered from any third party. Therefore, any third-party recovery which is less than the total amount of compensation already paid, or to which the employee is entitled, inures to the benefit of the employer and his insurance carrier. To the extent that the employee compromises his third-party claim and settles for less than he would recover upon a full judicial determination, the employer is to that degree prejudiced. Section 933(g) attempts to avoid this possibility of hardship to the employer by requiring that the employee obtain the written consent of the employer to any compromise he may enter into. If no such consent is secured, the statute, in effect, conclusively presumes prejudice and bars *any* further compensation recovery from the employer. *See Marlin* v. *Cardillo*, 68 U.S.App.D.C. 201, 95 F.2d 112 (1938).

Although appellant does not take issue with the manner in which the statute operates when an employee has settled his claim against a third party, he asserts that, under the circumstances giving rise to the consent judgment here, it was not a "compromise" but a "judicial determination" of the amount of recovery to which he was entitled. Chief reliance for this proposition is placed on *Banks* v. *Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968). In *Banks*, the wife of a deceased employee obtained a jury verdict in a wrongful death action against a third-party tortfeasor for $30,000. The third party moved for a new trial and the trial judge ruled that the motion would be granted unless the plaintiff consented to a remittitur of $11,000. The plaintiff accepted the remittitur without first seeking the written approval of the decedent's employer. The employer contested a subsequent claim for compensation by decedent's wife on the ground that further compensation was barred by the acceptance of a remittitur, which the employer contended constituted a compromise. The Su-

preme Court held that the remittitur was a judicial determination of recoverable damages rather than a mutual agreement between the parties. The Court reasoned that the danger of prejudice to the employer "is not present when damages are determind, not by negotiations between the employee and the third party, but rather by the independent evaluation of a trial judge." 390 U.S. at 467.

The case before us is clearly distinguishable. First, the consent judgment was not the result of the judge's independent finding of the value of the claim after full presentation of the evidence, but was at most an informal exploratory attempt to determine the possibilities for private settlement—a practice within a familiar tradition and well understood by the participants. Second, the record does not indicate, and appellant has not argued, that the trial judge in any way forced acceptance of his suggested figure by indicating that it was the highest amount he would accept from the jury if appellant decided to go to trial. Third, since appellant was free to reject the settlement opportunity and have the case heard, the possibility of prejudice to the employer, arising from appellant's acceptance of a lesser amount than a jury might award, did exist here.

In no way can this private compromise be considered a judicial determination. Certainly the mere intervention of the trial judge at the pretrial stage in an effort to encourage settlement does not make the agreement any less a private compromise. *Compare Bell* v. *O'Hearne*, 284 F.2d 777 (4th Cir. 1960). In view of the parties' stipulation that no written consent to this compromise was secured from the employer, appellant's subsequent claim before the Bureau was barred, as the District Court found, under Section 933(g).

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1970

No. 23,945

Civil Action 2270-68

MORAUER & HARTZELL, INC., ET AL.

v.

E. D. WOODWORTH, DEPUTY COMMISSIONER,
BUREAU OF EMPLOYEES COMPENSATION

ALEXANDER MCCLANAHAN, APPELLANT

Appeal from the United States District Court
for the District of Columbia

Before MCGOWAN, MACKINNON and ROBB,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed.

Per Curiam

For the Court:

NATHAN J. PAULSON
Clerk

Dated: December 30, 1970.

Opinion per Curiam.

SUPREME COURT OF THE UNITED STATES

No. 6810, October Term, 1970

ALEXANDER MCCLANAHAN, PETITIONER

v.

MORAUER & HARTZELL, INC., ET AL.

On petition for writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

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IN THE

Supreme Court of the United States

No. 70-5097

ALEXANDER McCLANAHAN,

Petitioner,

v.

MORAUER & HARTZELL, INC.,
LIBERTY MUTUAL INSURANCE COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

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Of Counsel:
GEORGE H. MITCHELL, JR.
CHARLES DE SHAZO

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IN THE

Supreme Court of the United States

No. 70-5097

ALEXANDER McCLANAHAN,

Petitioner,

v.

MORAUER & HARTZELL, INC.,
LIBERTY MUTUAL INSURANCE COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (A. 69) is reported at 439 F.2d 550, _____ U.S.App.D.C. ___ (1970).[1]

[1] "A" refers to Appendix page number. "R" refers to the Index number of the record.

JURISDICTION

The judgment of the Court of Appeals was entered on December 30, 1970. (A. 74) A timely petition for a Writ of Certiorari was filed on March 30, 1971, and was granted June 1, 1971. The jurisdiction of this Court is invoked under 28 United States Code 1254(1).

QUESTIONS PRESENTED

1. Under the Longshoremen's and Harbor Workers' Compensation Act when a third party tort suit is settled by compromise for an amount of money that is less than that for which the employer has been held liable by the Bureau of Employee's Compensation, and such settlement has been made without first obtaining the consent of the employer, then the employee is barred from receiving further compensation under the Act. If the amount received by the settlement is found to have resulted from a judicial evaluation of the claim, it is not considered to have been settled by compromise and the claimant is entitled to receive further compensation under the Act. The question is, what participation by a judge would suffice in order to consider the settlement figure to be the result of a judicial determination?

2. Petitioner's injury was unquestionably the result of the aggrevation of a pre-existing condition, a mental illness. The Deputy Commissioner has never made a finding that the petitioner's injury, his mental illness, has improved to the extent that he should be able to return to work. Instead, the Deputy Commissioner made a finding that as of November 1, 1965, the petitioner's condition had reverted to the status which existed prior to the accident on October 19, 1962. Under the case law of the District of Columbia, the employer must compensate the workman for the consequences of an accident although his previous defects cooperated in producing them. Is the Deputy Commissioner's above-mentioned "status" finding consistent with the case law of the United States Court of Appeals for the District

of Columbia in its interpretation of the Longshoremen's and Harbor Workers' Compensation Act?

3.(a) Petitioner filed his formal application to modify the award of 1964 in 1967 over a year after the award. At the initial hearing before the Deputy Commissioner this issue was not raised. Can it be raised after the evidence has been submitted?

3.(b) Respondent filed a complaint attacking the Deputy Commissioner's ruling within thirty-day statutory period, suspending the Order entered therein. Petitioner filed a Motion to Intervene with Answer, Cross-Claim and Counter-Claim some four months later. Having been allowed to intervene may petitioner file Cross-Claim and Counter-Claim?

STATUTE INVOLVED

The statute which is involved in this case is Section 33(g) of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 933(g)).

> "If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this Act, the employer shall be liable for compensation as determined by subdivision (f) only if such compromise is made with his written approval."

STATEMENT OF THE CASE

Petitioner is a person with a long history of mental illnesses. Some time in 1959 or 1960, he was hired as a laborer by Morauer and Hartzell, Inc. He worked continuously for them until the date of the accident, October 19, 1962. On that morning, petitioner was at work digging holes that would subsequently be filled with cement for building footings. He and another laborer were told to return to a hole that they had finished digging earlier to

deepen it around the sides. Following his earlier emergence from this hole, final preparations had been made for the pouring of the concrete. This included placing steel bars crossways for the purpose of reinforcement. Since these bars were about to become immersed in concrete it was not necessary and it was not the practice to make them very secure.

While the petitioner and the other laborer were digging in the hole, the steel bars, that were only a short distance above their heads, collapsed striking the petitioner on the skull. He was transported to the hospital where his wound was treated. Since that time, petitioner has not worked anywhere and he is firmly of the belief that he cannot. Petitioner claims that a recurrence of the mental illness and emotional anxiety which had not disturbed him in over two years prior to the accident resulted from this injury.

FIRST PROCEEDING BEFORE DEPUTY COMMISSIONER

A claim was duly filed with the Bureau of Employee's Compensation, hereinafter referred to as the "Bureau", and on August 24, 1964, respondents were ordered to pay compensation to petitioner for temporary total disability at the maximum rate of $70.00 per week for a period from October 20, 1962, to November 1, 1963. The total award was $3,780.00. (A. 1)

UNITED STATES DISTRICT COURT; THIRD PARTY CLAIM

Prior to this award, petitioner and his wife filed a civil action against a third party tort-feasor, Ray Gains, Inc., in which they alleged that the negligence of one of their employees was the proximate cause of the pipes collapsing in the hole where petitioner was working.

Petitioner changed counsel a number of times and finally reported for trial in January, 1967, with no counsel. Judge Luther W. Youngdahl continued the case until February 20, 1967, advising the petitioner to return with counsel at that

time. Some time during this period present counsel agreed to represent him in the third party claim.

On the morning of February 20, 1967, Judge Youngdahl called counsel into his chambers and stated that he had read the file and that from his years of experience he had arrived at what he considered a fair evaluation of the worth of the claim. Besides the pleadings, the file included a deposition of plaintiff taken by the defendant and a pretrial statement which listed the special damages claimed by plaintiff, as well as the defendant's theory of defense. An original demand of $9,000.00 was rejected by the Judge as excessive. He then had discussions with counsel separately and together. The outcome of these discussions was a consent judgment in the total amount of $5,000.00, of which $2,000.00 was awarded to the petitioner and the balance of $3,000.00 to his wife for loss of consortium. (A. 4)

Nobody from the compensation carrier participated in these discussions nor was their written consent to the amount sought.

Judge Youngdahl then recommended that we go into the courtroom and have the petitioner and his wife voice their acceptances of the consent judgment. At that time he advised them to return to the Bureau to seek a modification of their earlier award.

SECOND PROCEEDING BEFORE BUREAU OF EMPLOYEE'S COMPENSATION

On July 26, 1967, petitioner filed a claim with the Bureau seeking a modification of the award of August 24, 1964. He claimed permanent total disability. Petitioner had written a letter complaining about the earlier award a few weeks after it was made. Counsel for petitioner had intended to use this letter as notice of petitioner's claim to modify the award within the one year time limitation. However, at the opening of the hearing, the Deputy Commissioner asked what was at issue and at that time the

respondents did not raise the issue of timeliness and thereby waived it.

Hearings were held on December 11, 1967, and March 28, 1968. (A. 7, 31, R. 9) It was respondent's contention that petitioner was not entitled to further compensation on the grounds that he had compromised his third party suit for an amount less than that which the Bureau had awarded him without obtaining their consent as required by Section 933(g) of the Longshoremen's and Harbor Workers' Compensation Act.

Respondents called John F. Mahoney, Jr., Esquire, who was the attorney representing the third party tort-feasor in the discussions with Judge Youngdahl, and he was questioned at length concerning these discussions. (A. 31, R. 9, p. 49) There was no other evidence on the question of whether or not the consent judgment was the result of a judicial determination and thus not to be viewed as a compromise barring further recovery. On the basis of this evidence, the Deputy Commissioner concluded that the settlement was the result of a judicial evaluation and therefore the petitioner was not barred from returning to the Bureau and seeking a modification of the earlier award.

The only other testimony at the hearing was that of Dr. Marvin Korengold, a neurologist. Dr. Korengold had examined the petitioner on July 15, 1963, and on February 17, 1967. He was asked to give his medical opinion concerning the permanency of the petitioner's injury. This colloquy followed:

> "*Witness:* From a neurological view his disability is zero, in terms of neurological testing and functioning. From an emotional point of view, this really becomes a psychiatric determination, which I don't know would be fair for me to state. But from what I have been able to see and observe of this man, I

feel he is emotionally seriously disabled. And I am not taking the position that he is emotionally disabled at this point because exclusively of the accident. I am taking the position that the accident increased his emotional stress and helped to fixate in some way this man upon his emotional sysmptoms.

Deputy Commissioner: You feel, then this injury aggrevated his pre-existing emotional problem. Is that right, doctor?

Witness: Yes....

Deputy Commissioner: Do you feel he is totally disabled from performing any type of work.

Witness: From a physical point of view--no.

(Then further on)

Witness: From an emotional point of view, I cannot visualize this man working, unless the psychiatrists are able to help him." (A. 21, R. 9)

The only other medical evidence received by the Deputy Commissioner was a letter dated December 23, 1965, that Dr. Leon Yochelson had written to John F. Mahoney, Jr., Esquire, who at the time was representing Ray Gains, Inc., in the third party suit. (A. 50) According to its contents this letter was based upon a two hour interview with the petitioner five days prior to the date of the letter. This would be over three years after the accident and nearly two years before the hearing. It concluded with the following paragraph:

> "Mr. McClanahan has a history of both periods of anxiety and of an unstable, inadequate and dependent personality. I have no evidence that his personality at this time is any different than what it had always been during his adult years and therefore conclude that there is no relationship between his complaints and the events of October 19, 1962." (A. 54)

On the basis of this evidence, the Deputy Commissioner made a finding for temporary partial disability (25% impair-

ment) for a period of 104-2/7 weeks. (A. 62) He then stated:

> "That as of November 1, 1965, the claimant's emotional and functional symptoms due to the injury terminated and his condition reverted to his status which existed immediately prior to the injury of October 19, 1962." (A. 64)

SECOND PROCEEDING IN THE UNITED STATES DISTRICT COURT

Respondents filed a complaint in the United States District Court praying for relief from the ruling. (R. 1) They based their contentions on a lack of substantial evidence to support the Deputy Commissioner's findings in three areas: (1) appellant's claim was not timely filed; (2) the record was void of evidence of a change in petitioner's condition warranting a modification of an earlier award, and (3) that the consent judgment was not based on a judicial evaluation but was in fact a compromise and therefore under the circumstances petitioner was barred from receiving the award.

Petitioner filed a Motion to Intervene, accompanied by an Answer, a Cross-Claim and a Counter-Claim. (A. 65, R. 4) The basis for the Cross-Claim and Counter-Claim was that there was not sufficient evidence for the Deputy Commissioner's finding that petitioner was only temporarily partially disabled (25%), and that he reverted automatically to this prior status on November 1, 1965. A Motion to Dismiss this action as untimely was filed by the respondents and denied. (R. 8) Cross Motions for Summary Judgment were filed and argued before Judge George L. Hart of the United States District Court for the District of Columbia. (R. 9, 10, 15) At the hearing, the only action on which the Judge ruled was that concerning the matter of the finding of a judicial evaluation by the Deputy Commissioner. He ruled that this was not such a determination but was instead a settlement by compromise, thereby over-ruling the award

made by the Deputy Commissioner. All the other questions became moot. (A. 67, R. 18)

PROCEEDINGS BEFORE THE UNITED STATES COURT OF APPEALS

An appeal was noted by the petitioner to the United States Court of Appeals for the District of Columbia on February 16, 1970. Briefs were filed by petitioner and respondents and the case was argued on November 9, 1970. On December 30, 1970, the United States Court of Appeals affirmed the judgment entered in the United States District Court. (A. 74, R. 24)

SUMMARY OF ARGUMENT

I

The United States Court of Appeals for the Fourth Circuit in *Bell v. O'Hearne,* 284 F.2d 777 (1960) held that when a claim against a third party tort-feasor was settled after there had been a judicial evaluation made of the claim it was not necessary to obtain the consent of the compensation carrier in order to keep the claimant's compensation rights alive.

In *Banks v. Chicago Grain Trimmers Association,* 390 U.S. 459, 88 S.Ct. 1140, 20 L.Ed.2d 30 (1968) this Court upheld this principle in a case involving a similar fact situation. It stated:

> "Section 33(g) protects the employer against his employee's accepting too little against a third party. The danger is not present where damages are determined, not by negotiations between the employee and the third party, but rather by the independent evaluation of a trial judge."

In the instant case the petitioner's third party claim was settled in a conference held just before trial. It was attended by the attorneys for the claimant and the third party tort-feasor in the chambers of the trial judge. The judge participated in this settlement conference. There was

no representative from the compensation carrier nor was there consent sought as to the settlement figure.

The United States Court of Appeals for the District of Columbia Circuit distinguished this case from the *Banks* ruling referring to the judge's participation as exploratory. They emphasized the need for a full trial before the judge could evaluate the claim.

It is urged that this was not the ruling in *Banks* but in fact what *Banks* emphasized was the participation in the settlement by the trial judge as against the attorneys for the claimant and third party tort-feasor negotiating alone. To say that where settlement is made under those circumstances, it must be conclusively presumed that the compensation carrier's rights were prejudiced is to conclude the judge is incapable of protecting their rights.

Furthermore, it is not consistent with the present trend which is to encourage settlements. Trials in hopeless cases would be made necessary by the insurance carrier's refusal to consent to what might be a fair settlement.

II

The claimant's injury is the aggrevation of a pre-existing condition, a mental illness. When he was struck on the head on October 19, 1962, his condition was so aggrevated that he has never been able to return to work. He was first made an award of temporary total disability through November 1, 1963.

In his application to modify it to permanent total disability, the Deputy Commissioner ruled that he was 25% impaired from November 1, 1963, until November 1, 1965, and then his status reverted to that which existed prior to the accident.

It is urged that there is not substantial evidence, as a matter of fact, no evidence at all, to substantiate a finding of partial disability nor that he is recovered to the extent that he can return to work.

The Court designated petitioner's condition with a "before and after" status. This is contrary to the case law in the District of Columbia which states that "the employer must, in general, compensate the workman for the consequences of an accident although his previous defects cooperated in producing them" *National Homeopathic Hospital Association of District of Columbia v. Britton*, 79 U.S. App. D.C. 309, 147 F.2d 561 (1945).

Applying the above rule to the evidence produced at the hearing requires a finding of permanent total disability.

III(a)

Respondent raised two points of timeliness. First, was the petitioner's failure to seek a modification of the award within the one year statutory period. It is urged that the respondent was required to raise this defense at the first hearing and by its failure to do so, waived it. Section 13(b) of the Act so provides.

III(b)

The second issue of timeliness relates to petitioner's proceedings of cross-claim and counter-claim filed in the United States District Court. Respondent had filed a complaint in the District Court on the 29th day thereby suspending the order of the Deputy Commissioner. A few months later, petitioner filed a Motion to Intervene with an Answer, Cross-Claim and Counter-Claim attached. The Court granted the Motion.

Although there are no cases exactly on point since the Federal Rules of Civil Procedure went into effect, intervention has been allowed as a matter of right in analagous situations. Furthermore Counter-Claims have been allowed as coming within the terms of Rule 13(a) as a claim which "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. *Switzer v. Locklin* (C.A. 7, 1954) 207 F.2d 483, Cert. den. (1954) 347 U.S. 912, 74 S.Ct. 477, 98 L.Ed. 352.

ARGUMENT

I

COURT ERRED IN FAILING TO FIND THE SETTLEMENT TO BE THE RESULT OF A JUDICIAL EVALUATION THEREBY ALLOWING CLAIMANT TO SEEK FURTHER COMPENSATION EVEN THOUGH COMPENSATION CARRIER'S CONSENT TO SETTLEMENT HAD NOT BEEN OBTAINED.

In the earlier days of the Longshoremen's and Harbor Workers' Compensation Act, Section 33(g) was given a very strict interpretation and anything short of a full-scale and time-consuming trial was considered a compromise. As stated previously, when this compromise resulted in a settlement whereby the claimant received an amount less than he had previously received from the compensation carrier and the compensation carrier had not given his consent to the settlement, claimant was barred from further recovery. In recent years, on the basis of two very important cases interpreting this statute, deep inroads have been made which have lessened the harsh effects of these earlier cases. They are *Banks v. Chicago Grain Trimmers Association*, 390 U.S. 459, 88 S.Ct. 1140, 20 L.Ed.2d 30 (1968) and *Bell v. O'Hearne*, 4th Cir. 284 F.2d 777 (1960).

It was felt that the strict interpretations only served to benefit the insurance companies with windfalls and at the same time cause needless and unfair hardships to those who had been victims of industrial accidents.

Furthermore, although not mentioned in any previous opinions, it caused settlements to be discouraged and courts, already bogged down with heavy calendars, were burdened with trials where a plaintiff might not have any hope of prevailing because of his own contributory negligence, a defense unavailable to the employer.

There is no doubt that there is merit in protecting the carrier's lien, but there is some question as to how much protection is required. This is especially true when failure

to meet that standard can result in such a devastating hardship to be visited on the victim of an industrial accident. In the instant case, the victim has not worked since October 19, 1962, a period of almost nine years. At the hearing the doctor in his testimony implied that he did not see much likelihood that he would ever work again.

> "From an emotional point of view, I cannot visualize this man working, unless the psychiatrists are able to help him." (A. 21)

But the purpose of this Act is to provide assistance for employees injured at their work, and "the Act must be literally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." *Bell v. O'Hearne*, supra. Also Section 20 of the Act in discussing presumptions states:

> "In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary, (a) That the claim comes within the provisions of this Act." 33 U.S.C. 920.

In the first of these two cases, *Bell v. O'Hearne*, supra, a widow sued the third party tort-feasor in a wrongful death action. She was awarded a judgment of $6,500.00. She settled this judgment for $5,000.00 and then returned to the Employee's Compensation Commission for further benefits. The carrier apparently recovered the bulk of the $5,000.00 because their lien exceeded that amount, in fact, it was implied in the case that it exceeded $6,500.00. At the time she compromised, and it is hard to see this as anything other than a compromise if such is the holding in the instant case, the widow did not obtain the carrier's consent. Judge Simon Sobeloff in his opinion traced the history of the cases interpreting this Section of the Act, 933(g), and concluded that the carrier had not been prejudiced since there had been a judicial determination of the value of the claim.

The concept of a judicial determination was brand new. It is to be noted also that the figure that was judicially determined was really nothing more than a starting point to use for bargaining towards a settlement between the parties. It can safely be assumed that this bargaining was done in the absence of a judge. In fact, it can further be assumed that the bargaining was more than likely done some time after the trial in a climate lacking in the pressures surrounding the parties negotiating before a judge moments before a jury is impaneled.

As is noted, the big difference here is that the $5,000.00 settlement was the result of bargaining between the two parties alone, without a judge to protect the rights of the employer. There was no way in the world that the $1,500.00 that had been bargained away to gain the settlement, could be recouped by the lienor.

It is urged that petitioner stands in a higher position than the claimant did in *Bell v. O'Hearne*, supra. In fact, his position is about on a par with that of the claimant in *Banks v. Chicago Grain Trimmers Association*, supra.

The United States Court of Appeals for the District of Columbia Circuit, in affirming the District Court in the instant case, drew three distinctions between the *Banks* case and the instant case. With all due respect to the Court of Appeals, it is urged that these distinctions are lacking in substance and more important, do not go to the all important question of prejudicing the carrier's lien.

Firstly, it is stated that "the Consent Judgment was not the result of the judge's independent finding of the value of the claim *after a full presentation of the evidence* but was at most an informal exploratory attempt to determine the possibilities for private settlement." (Emphasis added). (A. 73)

The above clause is emphasized because petitioner submits that factually this is the only difference between the instant case and *Banks*. What is really being discussed is the rela-

tive knowledge of the judges in each case. Although Judge Youngdahl did not hear all the evidence under oath, it is urged that he was sufficiently informed to make a fair evaluation of the claim. He had available to him, and had presumably read, the transcript of petitioner's deposition under oath as well as the pre-trial statement listing the special damages of petitioner and the defenses that were to be relied upon by the third party defendant. Counsel for both sides were present and able to state their positions. And, at this point, it might be noted that there would be no practical benefit to the judge in having available counsel for the insurance carrier who had not participated in any way in earlier proceedings of the case. Any knowledge that he could acquire about the case at this juncture would be learned in the same manner by which the judge was informing himself. His ability to evaluate the claim was on a par with the judge's.

The key words in the *Banks* case do not hold that a trial is always necessary. This Court made the following quote from *Bell v. O'Hearne*, supra:

> "Section 33(g) protects the employer against his employee's accepting too little against a third party. The danger is not present where damages are determined, not by negotiations between the employee and the third party but rather by the independent evaluation of a trial judge."

What is emphasized here is the judge's participation as against the two parties dealing alone, and that participation resulting in the judge making an independent evaluation of the claim. There is nothing in the language requiring the judge to sit through a complete trial in order to have a basis for his independent evaluation. In fact, such a condition would be contrary to this Court's concern with the already overburdened trial calendars throughout the country.

It is submitted that a great deal of confusion and misunderstanding has resulted from the Court's making a distinction between a compromise and a judicial determination.

Too much has been made of the word "compromise" as a term of art. "Compromise" has been viewed synonymously with "settlement" and the settlement of this type of claim by any means appears to be viewed as unacceptable under the opinion promulgated by the United States Court of Appeals for the District of Columbia Circuit. It is urged that this Court in *Banks* did not hold that all settlements are unacceptable pursuant to Section 33(g) but that a distinction is made when the settlement is the result of a judicial evaluation. At the very least, the compensation's carrier should be required to show that the settlement resulted in prejudicing his position. He should not receive the benefit of a conclusive presumption of prejudice.

The Act is to be construed liberally for the benefit of employees and their dependents.[2] In their favor doubts, including the factual, are to be resolved.[3]

The second distinction found by United States Court of Appeals is that the figure arrived at by Judge Youngdahl's evaluation was not the same as a remittitur in that he did not say that it was the highest amount he would accept.

It is urged that this distinction washes away like footprints before a rising tide when placed in its proper perspective. All we are really discussing is at what particular juncture of the case is the force being applied. In the *Banks*

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[2]Voris v. Eikel, 346 U.S. 328, 333, 74 S.Ct. 88, 98 L.Ed. 5 (1953); Baltimore & Philadelphia Steamboat Co. v. Norton, 284 U.S. at 414, 52 S.Ct. 187; Hancock v. Einbinder, 114 U.S.App.D.C. 67, 70, 310 F.2d 872, 875 (1962); Phoenix Assurance Co. of New York v. Britton, 110 U.S.App.D.C. 118, 120, 289 F.2d 784, 786 (1961); J. V. Vozzolo, Inc. v. Britton, 126 U.S.App.D.C. 259, 262, 377 F.2d 144 (1967).

[3]Howell v. Einbinder, 121 U.S.App.D.C. 312, 314, 350 F.2d 442, 444 (1965); Hancock v. Einbinder, supra note 2, 114 U.S.App.D.C. at 70, 310 F.2d at 875; Phoenix Assurance Co. of New York v. Britton, supra note 2, 110 U.S.App.D.C. at 120, 289 F.2d at 786; Friend v. Britton, 95 U.S.App.D.C. 139, 141, 220 F.2d 820, 821, cert. den.; Harry Alexander, Inc. v. Friend, 350 U.S. 836, 76 S.Ct. 72, 100 L.Ed. 745 (1955); J. V. Vozzolo, Inc. v. Britton, 126 U.S.App.D.C. 259, 262, 377 F.2d 144 (1967).

case the jury made a judicial evaluation that exceeded the bounds of reasonableness set by the judge. He then made a judicial evaluation—a compromise figure—and told the claimant that if he did not accept this figure he must stand a new trial which would more than likely result in a third evaluation differing from the other two.

In the instant case, petitioner could accept the independent judicial determination made by Judge Youngdahl or face trial. This pressure, as a practical matter, was just as real as that presented in *Banks.* The only difference is the time at which it is applied and being applied at the very moment when trial is at hand really causes the pressure to be more substantially felt. Any plaintiff's attorney that has ever come to that final moment with a case having a poor basis for liability will voice his accord to that.

The third distinction drawn between the cases seems to be based on the premise that only a jury trial would suffice to avoid prejudice to the compensation carrier. However, this is not the case if a remittitur is a judicial evaluation. As a matter of fact, this argument seems to fly in the face of the rationale of *Banks,* since it was not held there that a jury trial was at all required.

The case holds that the two parties alone cannot settle. It is submitted that the compensation carrier's interest is adequately protected if the judge participates and renders his independent evaluation of the claim.

II

PETITIONER ALLEGES THAT THE DEPUTY COMMISSIONER ERRED IN NOT FINDING HIM TO BE PERMANENTLY TOTALLY DISABLED.

At the same time that the trial judge granted respondent's Motion for Summary Judgment, he denied the petitioner's Cross-Motion. This Cross-Motion was based on the lack of substantial evidence to support the finding that petitioner was only entitled to be compensated for temporary partial disability (25% impaired) for a period extending from November 2, 1963, to October 13, 1965. There were no

findings of facts made by Judge Hart in denying this Cross-Motion. It is believed that this was because the matter became moot when he granted respondent's Motion.

It is urged that the finding of the Deputy Commissioner was arbitrary and was not supported by any of the evidence that he had before him.

This evidence consisted of the sworn testimony of Dr. Marvin Korengold (A. 10) who appeared at the request of the petitioner and a letter written by Dr. Leon Yochelson to John F. Mahoney, Esquire. The letter was moved into evidence by the respondent with the petitioner's consent. (A. 50)

Petitioner will first discuss Dr. Yochelson's letter which was dated December 23, 1965, and was based on an interview he had with the petitioner five days earlier. This would be over three years after the accident and almost two years prior to the hearing.

Dr. Yochelson traced the history of petitioner from birth, through his military service which resulted in a Disability Discharge in 1943 on the basis of psychoneurosis, anxiety and finally up to his visits to doctors following the accident. He concluded with a diagnosis that petitioner had a history both of periods of anxiety and of an unstable, inadequate and dependent personality. On the basis of his premise that petitioner's personality at this time is no different than it had always been during his adult life, he reached the conclusion that there was no relationship between petitioner's complaint and the accident. This is a legal conclusion and contrary to the case law in the District of Columbia.

Dr. Korengold's testimony paralleled Dr. Yochelson's letter in finding that petitioner still suffered from a mental illness. He said, "from an emotional point of view I cannot visualize this man working unless the psychiatrists are able to help him." (A. 21)

This was the total evidence relating to petitioner's injury. There was no evidence that petitioner had recovered to the extent that he could return to work nor did the Deputy

Commissioner make such a finding on the basis of the record. Instead, he made what can only be designated as a "status" finding which, on its face, is in conflict with the case law in the District of Columbia.

The Deputy Commissioner held that the petitioner's condition reverted on November 1, 1965, to his status which existed immediately prior to the accident. This is to say that as of November 1, 1965, although there is no change in the petitioner's condition, its cause arbitrarily becomes the result of the pre-existing condition and is in no way affected by the accident. Therefore he is precluded from further compensation.

A tort-feasor must take his victim as he finds him: This maxim has been applied in the District of Columbia in compensation cases.

> "In a negligence case, the question is not what the accident would have done to a different man, but what it actually did to its victim. This is equally true in compensation cases. Therefore, the employer must, in general, compensate the workman for the consequences of an accident although his previous defects cooperated in producing them." *National Homeopathic Hospital Association of D.C. v. Britton*, 79 U.S. App. D.C. 309, 147 F.2d 561 (1945).

Here we have a case of a man with a latent mental condition on October 18, 1962, who for two years had been steadily employed. On October 19, 1962, he suffered an injury which aggrevated this condition. Since that date, the petitioner has been unemployed. On August 24, 1966, the Deputy Commissioner made the following finding:

> "That as a result of the injury the claimant has been wholly disabled from October 20, 1962, to November 1, 1963, inclusive, 54 weeks, and for such temporary total disability he is entitled to compensation at the maximum rate of $70.00 per week, in the amount of $3,780.00." (A. 2)

On December 23, 1965, Dr. Yochelson, who examined the petitioner at the request of the third party tort-feasor made

a diagnosis that the petitioner's mental illness existed his entire adult life. Because of this, he found no relationship between it and his complaints deriving from the accident. Nowhere does he find that the petitioner is capable of working and that he is no longer disabled.

Finally there is the earlier mentioned testimony of Dr. Korengold, resulting from his examination of petitioner, in which he stated after protesting that he did not know whether it would be fair for him to state:

> "But from what I have been able to see and observe of this man, I feel he is emotionally seriously disabled. And I am not taking the position that he is emotionally disabled at this point because exclusively of the accident. I am taking the position that the accident increased his emotional stress and helped to fixate in some way this man upon his emotional symptoms." (A. 21)

When asked directly by the Deputy Commissioner if he thought petitioner was totally disabled, the doctor stated that he didn't think he was from a physical point of view but that he could not see the man working again unless the psychiatrist could help him with his emotional problem.

Petitioner contends that there has been no changes in the petitioner's condition since the date of the accident. That the assignment of a "before and after" status by the Deputy Commissioner was an error in law. It is urged that there was not sufficient evidence to support the Deputy Commissioner's finding of temporary partial disability. There is no way this result can be reached in the light of petitioner's pre-existing condition without an arbitrary determination medically impossible to ascertain. Petitioner contends that the only finding the Deputy Commissioner could make was permanent total disability.

III

QUESTIONS OF TIMELINESS RAISED BY RESPONDENT

Respondent, in his Opposition to petitioner's Petition for a Writ of Certiorari, raised two issues of timeliness that they raised before the District Court and the United States Court of Appeals. The first of these concerned petitioner's application to modify the first award made by the Deputy Commissioner on August 24, 1964. (A. 27)

A. Timeliness of Notice of Modification of Award Before Employee's Compensation Bureau Waived

It is contended that respondent waived the question of timeliness when he did not raise it at the first hearing of the claim. The record shows that when the Deputy Commissioner asked respondent's counsel to state the grounds of controversy of the application for modification, respondent took the position that "the condition of the claimant is not related to the injury of October 19, 1962" and that "there is a bar to further recovery by virtue of the fact that there was a prior settlement" of the third party claim in contradiction of Section 33(g). No mention was made, or issue raised, concerning timeliness of the modification application. Section 13(b) of the Act is specifically applicable to applications for modifications as well as original claims. Section 13(b) provides:

> "Notwithstanding the provisions of subdivision (a), failure to file a claim within the period prescribed in such subdivision shall not be a bar to such right *unless objection to such failure is made at the first hearing of such claim* in which all parties are given reasonable notice and opportunity to be heard." (Emphasis added).

Furthermore, apart from the statutory waiver, it is well settled that for an issue to be brought before the Court for judicial review under Section 21(g) it must have been raised before the Deputy Commissioner and where the record does

not show that it was raised, it will be considered as having been waived and will not be heard by the Court.[4]

B. Timeliness of Filing Answer, Cross-Claim and Counter-Claim Before United States District Court

On this question there has been very little written in case law especially since the Federal Rules of Civil Procedure came into being. The interpretations made in cases antedating the Rules as now promulgated can only be viewed by their effect in bringing about the rules.

In the instant case it is conceded that if the petitioner had been dissatisfied with the award made by the Deputy Commissioner, he would have been able to file his appeal in the District Court within the thirty-day period set by Section 921 of the Longshoremen's and Harbor Workers' Compensation Act. Thus, if the respondent employer and insurance carrier had not themselves filed the appeal on the 29th day, the status quo would have remained in effect, and on the 31st day conditions would be no different for petitioner. However, as soon as the respondent filed suit the petitioner no longer had a vested interest in the award by the Deputy Commissioner, but merely a highly tentative award and was even faced with the possibility of receiving nothing.

Thus we are faced with this question. Must the petitioner, having accepted a situation, which situation has been altered by the acts of another, the respondent here, be content to merely retain passively his previous situation despite the fact that the respondent desires to alter not only the respondent's situation but of necessity the petitioner's situa-

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[4]Parker v. Motor Boat Sales, Inc., 314 U.S. 244 (1941); Britton v. Great American Indemnity Co., 110 U.S.App.D.C. 190, 290 F.2d 381, (1961); Maryland Casualty Co. v. Cardiollo, 71 U.S.App.D.C. 160, 107 F.2d 959 (1939); Metropolitan Casualty Ins. Co. v. Hoage, 67 App. D.C. 54, 89 F.2d 798 (1937)

tion. In other words, may petitioner now decide that the original award was insufficient and that if the respondent is permitted to ask for relief, may petitioner also ask for an increase in his award?

In the respondent's brief opposing the intervenor's counter-claim and cross-claim in the District Court below, respondents cited as one of their authorities *Associated Indemnity Corporation v. Marshall,* 71 F.2d 235 and 420.

Aside from the fact that the *Associated* case was decided in 1934, before the Federal Rules of Civil Procedure came into effect, the law decided by this case is unclear. The case is actually two cases, No. 7118 being reported at p. 235 of 71 Federal 2nd and No. 7235 at page 420.

In the latter decision, the Ninth Circuit Court of Appeals said, per curiam:

> 'The question involved in case No. 7118 was whether an appeal by a party indefinitely extends the time for an independent appeal by the other party or parties. To this question the Court answered in the negative.
>
> 'In the instant case the question is whether or not an appeal in the manner provided by law by one party gives the other party the right to answer the complaint and to set up by way of answer all defenses possible including a counterclaim or offset.'

It may also be significant that, in *Associated* the insurance carrier was attempting to upset an award to a claimant because in No. 7118 (at page 236) Judge Mack said:

> "To permit an attack upon the award at any time after the thirty-day period in order to obtain a *decrease* in the amount merely because the beneficiary had in proper time sued to set aside the award in order to obtain a larger award *would expose the beneficiary to the danger, in fact threatened in this suit,* of a suit for overpayments in case the attack, made too late as a strictly original proceeding, should be successful." (Emphasis added).

But the reasoning behind the court's decision in both Nos. 7118 and 7235 becomes incongruous when read in the light of the following portion of Judge Mack's decision (at page 237) which immediately follows the excerpt above:

> "It is suggested that it would be to the advantage of a party intending to litigate to delay filing suit until the end of the 30 day period in order to catch off-guard an adverse party, who, although he had substantial grounds for challenging the award, might prefer not to indulge in the expense of litigation unless forced to do so by the other party. In order to protect himself in case of such a last minute attack, such a party would be forced to file suit to set aside the award. The dangers thus suggested are not substantial enough to offer a persuasive guide to interpretation; moreover, one who has not appealed may intervene to sustain an award against attack. (Citing cases)."

It is submitted that the situation which Judge Mack believed to be "not substantial" is precisely the situation in which the petitioner now finds himself embroiled. In the present case, after petitioner's award by the Deputy Commissioner, the employer and its insurance carrier did wait until the 29th day to appeal the Deputy Commissioner's Order and the petitioner thus found himself in the position of being unable to protect his interests and it is submitted that Judge Mack's statement that "one who has not appealed may intervene" supports the intervenor's position rather than that of the respondent.

The only other authority relied upon by the respondent in the District Court is *Shugard v. Hoage*, 67 U.S.App.D.C. 52, 89 F.2d 796, but it is not seen to what extent this latter case is applicable since *neither* party had appealed the Deputy Commissioner's decision until after the thirty-day period had expired.

In fact, one of the authorities cited by Judge Mack in support of the foregoing statement is *United States Casualty Company v. Taylor, et ux*, (C.A. 4) 64 F.2d 521, cert. den.

1933, 290 U.S. 639, 54 S.Ct. 56, 78 L.Ed. 555, in which the Fourth Circuit took the opposite view.

This decision also involved two appeals, in one of which (No. 3410) it was decided that the claimant was not covered by the terms of the Longshoremen's and Harbor Workers' Compensation Act. However, the other case (No. 3411) related directly to the question as to whether or not the insurance carrier was properly permitted to intervene.

Originally, the Deputy Commissioner had held that the claimant was not employed in maritime work and therefore was not entitled to recover, under the Act. The unsuccessful claimant filed a complaint in the District Court to have the order set aside, and was successful at that point in convincing the District Judge of the righteousness of his claim. Of course, the insurance carrier, U.S. Casualty and *not* appealed the Deputy Commissioner's Order; it was content with its lot.

However, when the District Court reversed the Deputy Commissioner, the insurance carrier suddenly found itself in an untenable position of liability and therefore *after the District Court had rendered its original decree,* U.S. Casualty moved that (a) the decree be set aside and (b) that it be allowed to intervene as a party defendant so that it might prosecute an appeal.

In rejecting the claimant's theory that the insurance carrier could not be a party defendant because Section 921 of the Longshoremen's and Harbor Workers' Compensation Act says that suits can only be brought against the Deputy Commissioner, the Fourth Circuit Court of Appeals said, at page 526:

> "If this interpretation is correct, the result would be that only the losing party before the deputy commissioner, whether it be the injured workman on the one hand, or the employer or the insurance carrier on the other, would have the right to be heard in the injunction suit in either the District Court or in the Circuit Court of Appeals, and the successful

> party before the deputy commissioner would have no right to defend the advantage which he had won. This conclusion is too unreasonable to be entertained."

It is submitted that, even though *U.S. Casualty* was also decided before the Federal Rules of Civil Procedure became effective, the logic of the foregoing decision is wholly consistent under Rules 13 and 24 of Federal Rules of Civil Procedure, with permitting the present petitioner "to defend the advantage which he had won" in the present case.

Insofar as the right of a compensation claimant to intervene after an insurance carrier has filed an appeal, this appears to be a case of first impression, either prior to or following adoption of the Federal Rules of Civil Procedure.

In *Moore's Federal Practice*, 2nd Ed., Vol. 3B, in discussing the absolute right to intervene under the 1966 version of Rule 24(a) with its requirements of interest, impairment and inadequacy of representation, Prof. Moore sums it up under Sec. 24.09-1 (1) (pp. 24-285 of the 1970 revision):

> ". . . considering the impact on his interest if he is not given the right to intervene, should the applicant now be granted that right?"

Thus, it would seem that the proper basis for allowing, or refusing, intervention rests upon a determination of the "balance of interests."

In *Kozak, et al v. Wells, et al*, 278 F.2d 104, decided in 1960 by the Eighth Circuit Court of Appeals, the then Circuit Judge Blackmun, thoroughly discussed the facets of intervention as a matter of right. Although one of several intervenors did not file his motion until almost a year after the filing of the original complaint, it was considered timely because no prejudice had been shown, and

> "Timeliness is to be determined from all the circumstances shown." (page 109)

Judge Blackmun, citing *Wolpe v. Poretsky*, 79 U.S. App. D.C. 141, 144 F.2d 505, 508, cert. den. 323 U.S. 777, 65 S. Ct. 190, 89 L. Ed. 621, said that "there are even occasions

where intervention is proper after judgment" (Page 109). *Kozak v. Wells,* supra, is also authority for the fact that the inadequacy of the representation of the intervenor's interests need not be positively shown; it is enough if such representation *may* be inadequate (page 110). It is also not essential that the effect of the ultimate judgment be res judicata as to the intervenor if the effect is such that the intervenor in a very real sense would be bound (page 110). And, in the present action, petitioner in a very real sense *will* be bound by the outcome.

In *Wolpe et al v. Poretsky, et al, supra*, the Zoning Commission of the District of Columbia rezoned a tract of land after the public hearings, as required by law. The defendant, Poretsky, brought suit to prevent the Zoning Commission from carrying out the zoning order, and the Court held that the Commission had been capricious and arbitrary and enjoined the change of classification. The Court thus restored the previous zoning which would permit the erection of the apartment houses. On April 8, *after the decree was entered,* the Zoning Commission voted not to appeal and changed the zoning classification as directed by the Court.

On May 6, a large number of property owners filed a Motion for Leave to Intervene for the purpose of moving for a new trial, or, in the alternative, for the purpose of an appeal. This Motion was denied and a special appeal was taken.

In holding in favor of the property owners, the Court of Appeals for the District of Columbia held that:

> "The failure of the Zoning Commission to take an appeal clearly indicates that its representation of the interest of the interveners was inadequate. We do not go so far as to hold that adequate representation requires an appeal in every case. But here an administrative body is charged with arbitrary and capricious action in the face of a strong presumption that they properly performed their duties." (page 507).

The Court also said:

> "We do not pass on the merits of the court's findings or decree because the evidence is not before us. We only indicate that there is enough in the record to show that in refusing to take an appeal the Commission did not adequately represent the intervenors' interests." (Page 508)

The Court went on even further and said that intervention may be allowed after a final decree where it is necessary to preserve some right which cannot otherwise be protected, citing *U.S. Casualty Company*, supra, and Moore's Federal Practice, pp. 2384 and 2385.

While no case involving a claimant-intervenor under the Longshoremen's and Harbor Workers' Compensation Act has been found, it seems clear, according to the majority of cases relating to the subject and according to Prof. Moore, that when intervention is a matter of right, the intervenor clearly may certainly press a counter-claim arising out of the same transaction, or series of events.

In *United States v. Fidelity & Deposit Co.* (MD Pa. 1958) 22 F.R.D. 248, an action was instituted by Automatic Sprinkler Corp. against the prime contractor, Merritt, and its sureties for money due for work performed by Automatic in installing sprinkler system at the Signal Corps Depot at Tobyhanna, Pennsylvania. Plaintiff was a subcontractor of one Raff, who, in turn, was a subcontractor of Merritt. Merritt filed a third party complaint against The American Surety Company which was surety for Raff.

Raff intervened because he was notified that the suit had been filed and therefore (a) he would be bound by a judgment entered against American Surety and (b) the representation of Raff's interests might be inadequate because Raff had defenses and/or counter-claims to assert against Merritt which could not be asserted by American.

Intervention was allowed as being a typical example of permissive intervention, although Prof. Moore considered this to be a matter of right (*Moore*, Vol. 3B, Sec. 24.17, (3.-1) note 15).

In *Switzer v. Locklin* (C.A. 7, 1954) 207 F.2d 483, cert. den. (1954) 347 U.S. 912, 74 S.Ct. 477, 98 L. Ed. 352, Switzer had charged a number of defendants with infringement of patents. Locklin and Brant, doing business as Radiant Color Company, were granted leave to intervene but were denied the right to file a counterclaim. On appeal the counterclaim was allowed.

Radiant was not named as one of the original defendants, but the original complaint alleged that defendants had procured infringing material from Radiant. Radiant's counterclaim had alleged violations of antitrust laws by Switzer.

In allowing the counterclaim, the Court said (page 487):

> "Without the aid of authority, it would be our view that Radiant's counterclaim comes within the terms of Rule 13(a) as a claim which arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the Court cannot acquire jurisdiction!"

As to cross-claims, Prof. Moore has very little to say other than that "the principles applicable to counterclaims as set forth above (in Section 24.17 (3-1)) should also apply to cross-claims raised by the intervenor." (Section 24.17 (3.-3)). He follows with the simple statement that "By implication Rule 13 does allow the intervenor to raise a related cross-claim." (Citing cases, including *Formulabs, Inc. v. Hartley Pen Co.*, (C.A. 8), 318 F.2d 485 (1963).

In *Formulabs*, Hartley Pen sued DuPont for breach of warranty as to the dye purchased from DuPont for incorporation into ink made by Hartley for use in pens, also made by them. The ink was made by Hartley according to a secret formula supplied by Formulabs and, in the course of the original suit, DuPont sought to learn the secret formula by interrogatories.

Formulabs moved to intervene on the grounds that its right of ownership would be seriously injured if the formula was revealed and prayed that Hartley be enjoined from disclosing trade secrets.

In deciding in favor of the intervenors, the Court said, at page 492:

> "It appears clear under the above allegations that the Intervenors are so situated in respect to the main action as to be adversely affected by a distribution or other disposition of property which is in the custody of or subject to the control of disposition of the court in such action."

The Court also said, further, on page 492:

> "The Intervenors are entitled to their day in court and to have it in connection with the main action. The judgment of dismissal of the complaint in intervention is reversed."

It would appear that although this area of law is somewhat unclear that nevertheless to be consistent with the spirit and purpose of the Federal Rules of Civil Procedure and, furthermore, to interpret the Longshoremen's and Harbor Workers' Compensation Act in a way that conforms with the purpose of the Act, that petitioner's motion to intervene with cross-claim and counter-claims, is to be allowed. The Act itself says that the Deputy Commissioner's Order is suspended until all appeals from it have been adjudicated.

CONCLUSION

For the foregoing reasons the decision of the Court of Appeals should be reversed and the case remanded with directions that a Summary Judgment be granted to the petitioner and he be awarded compensation for permanent total disability from November 2, 1963, to date.

Respectfully submitted,

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Of Counsel:

George H. Mitchell, Jr.
Charles DeShazo

August 1971

IN THE

Supreme Court of the United States

No. 70-5097

ALEXANDER McCLANAHAN,

Petitioner,

v. v.

MORAUER AND HARTZELL, INC., and
LIBERTY MUTUAL INSURANCE COMPANY, ,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

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IN THE

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Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

COUNTER-STATEMENT OF THE CASE

The question this case presents under Section 33(g) of the Longshoremen's and Harbor Workers' Compensation Act (Title 33, U.S. Code, Section 933(g)) is whether the petitioner, without his employer's consent, "compromised" his suit against a third party, which "compromise", by the terms of Section 33(g), thereafter barred him from recovering any

further compensation to which he "would be" entitled under the Longshoremen's Act. Section 33(g) is thus prospective in effect, barring any future compensation after such an unconsented "compromise." Contrary to what might be inferred from petitioner's phrasing of this question (Brief, p. 2), the prospective effect of Section 33(g) does not depend upon the amount of compensation an employee has been awarded prior to his making the "compromise."

The details of petitioner's accident, which petitioner sets forth at length at pages 3 and 4 of his Brief, are not of record. The statements which petitioner attributes to Judge Youngdahl (Brief, p. 5) appear only in a memorandum which petitioner's counsel filed with the Deputy Commissioner (A. 55), which memorandum is not *evidence* of the alleged statements. There is also nothing of record to show the content of the file in petitioner's third-party suit or to support petitioner's statement (Brief, p. 5) that the file contained his deposition and a pretrial statement.

Petitioner is mistaken when he states (Brief, p. 6) that John F. Mahoney, Esquire, counsel for the third party, was respondents' witness at the hearing before the Deputy Commissioner. The transcript of that hearing makes it clear that Mr. Mahoney was *petitioner's* witness and that he testified "by and on behalf of the claimant" (A. 31). His testimony represents the extent of the evidence contained in the record of what transpired before Judge Youngdahl.

Mr. Mahoney testified that on February 20, 1967, the date set for the trial of petitioner's third-party action, counsel for the parties met in Judge Youngdahl's chambers, at which time, "in his usual manner," the judge discussed settlement of the case with counsel jointly and separately (A. 32). "As a result of the conference, an agreement was reached at $5,000.00," and the case was settled for that sum (A. 32). Petitioner's counsel made an initial demand of $9,000.00, and the third-party's counsel offered $5,000.00, which was generally the limit of his authority (A. 36-37). In the discussion, Judge Youngdahl "bandied several

figures around," and "some time during the discussion" he "felt that the case was worth $5,000.00" (A. 32, 36). Mr. Mahoney testified there were no settlement discussions between the parties themselves outside the presence of the judge, but all the discussions "took place either between the judge and the plaintiff's attorney or the judge and myself or the judge and both of us present and there was a hearing following the informal conference in Chambers in open court in which Mr. McClanahan was asked whether he was aware of the terms of settlement and was he satisfied with the terms of settlement and whether he realized that it would be a final settlement and he said yes." (A. 34)

Petitioner was an adult (A. 27, 35). There was no trial on the merits, no testimony offered, no jury impanelled, and no verdict rendered (A. 36). The discussions related to a settlement of the case and were not an adjudication of the case in the sense of a trial of the facts and of the issues involved (A. 36). Petitioner himself testified he was not in the judge's chambers during the settlement discussions (A. 38) and that, other than stating he agreed to the settlement, he did not testify before the judge or was asked or told him about the accident or his injuries (A. 39).

Petitioner does not set out the grounds of the Court of Appeals' decision. That decision (A. 69-73), by a unanimous three-judge panel of the Court composed of Judges McGowan, MacKinnon, and Robb, found that petitioner had been injured at his employment in 1962, and that he had thereafter filed a claim and the Deputy Commissioner had awarded him compensation in 1964. The Court found that while the claim was pending, petitioner had filed a suit against a third party, and on the day that case was set for trial, February 20, 1967, counsel for the petitioner and the third party "were called into chambers by the trial judge to discuss settlement" (A. 70). The Court then describes what happened: "Following his usual practice in exploring settlement possibilities in civil matters, the judge first conferred with both attorneys together and then spoke privately with each one. It appears that at some point during these discus-

sions the judge suggested that, having reviewed the file, the claim seemed to him to be worth $5,000.00. Although other figures were apparently also considered, the parties finally settled on the $5,000.00 figure, and on March 3, 1967, a consent judgment for that amount was entered. Appellant's wife received $3,000.00 and appellant received $2,000.00. Attorney's fees consumed $800.00 of appellant's share and the remaining $1,200.00 was turned over to the employer and its insurer . . ." (A. 70).

The Court noted (A. 72) that petitioner chiefly relied upon *Banks v. Chicago Grain Trimmers Ass'n.*, 390 U.S. 459 (1968), but held (A. 73):

> "The case before us is clearly distinguishable. First, the consent judgment was not the result of the judge's independent finding of the value of the claim after full presentation of the evidence, but was at most an informal exploratory attempt to determine the possibilities for private settlement—a practice within a familiar tradition and well understood by the participants. Second, the record does not indicate, and appellant has not argued, that the trial judge in any way forced acceptance of his suggested figure by indicating that it was the highest amount he would accept from the jury if appellant decided to go to trial. Third, since appellant was free to reject the settlement opportunity and have the case heard, the possibility of prejudice to the employer, arising from appellant's acceptance of a lesser amount than a jury might award, did exist here.
>
> "In no way can this private compromise be considered a judicial determination. Certainly the mere intervention of the trial judge at the pretrial stage in an effort to encourage settlement does not make the agreement any less a private compromise. *Compare Bell v. O'Hearne*, 284 F.2d 777 (4th Cir. 1960). In view of the parties' stipulation that no written consent to this compromise was secured from the employer, appellant's subsequent claim before the Bureau was barred, as the District Court found, under Section 933(g)."

SUMMARY OF ARGUMENT

I. The Court of Appeals correctly understood and applied this Court's decision in *Banks v. Chicago Grain Trimmers Ass'n., Inc.*, 390 U.S. 459 (1968), when it found that the petitioner had "compromised" his suit against a third party without the employer's consent and that therefore Section 33(g) of the Longshoremen's Act barred him from recovering further compensation, where the Court of Appeals found that the trial judge had made no "independent finding of the value of the claim after full presentation of the evidence," but made "at most an informal exploratory attempt to determine the possibilities of private settlement" and had left the parties free to accept or reject his suggested settlement figure. There was no trial, no testimony offered, no jury impanelled, and no verdict rendered. The trial judge therefore did not make a "judicial determination" of petitioner's claim against the third party, and the Court of Appeals properly found there was danger that petitioner might accept too little for his third party cause of action.

II. Petitioner's claim for further compensation was not filed with the Bureau of Employees' Compensation within the one year period provided by Section 22 of the Longshoremen's Act (Title 33, U.S. Code, Section 922) and respondents did not waive this defense when they did not raise it at the "first hearing" required by Section 13(b) of the Act (Title 33, U.S. Code, Section 913(b)), but did timely raise it before the case record was closed, since Section 13(b) by its terms is applicable only to claims for original injuries and there is no indication that Congress intended that section also to apply to claims for additional compensation under Section 22, that section containing its own time limitation and making no direct reference to Section 13.

III. Petitioner's "Cross-claim and Counter-claim," making an attack upon the Deputy Commissioner's order for failure to award petitioner permanent total compensation, was not timely filed in the District Court within the thirty-day

period provided by Section 21(a) of the Longshoremen's Act (Title 33, U.S. Code, Section 921(a)), and it was therefore barred in accordance with decisions interpreting this section of the Longshoremen's Act and other similar workmen's compensation acts. Cases decided under the Federal Rules of Civil Procedure are not applicable to this question, because this is a "matter of procedure" that is provided for by the Longshoremen's Act and therefore is expressly excepted from the Federal Rules pursuant to Rule 81(a)(6). In any event, there was substantial medical evidence which supported the Deputy Commissioner's denial of permanent total disability and his finding that petitioner's condition had reverted to its pre-injury status as of a certain date.

ARGUMENT

I.

THE COURT OF APPEALS CORRECTLY HELD THAT PETITIONER MADE A "COMPROMISE" OF HIS THIRD PARTY SUIT THAT BARRED FURTHER COMPENSATION.

A. Section 33(g) and Its Judicial Construction

When, as the Longshoremen's Act allows, an employee brings suit against a third party, Section 33(g) (Title 33, U.S. Code, 933(g)) provides:

> "If *compromise* with such third person is made by (the employee) of an amount less than the compensation to which such (employee) would be entitled under this Act, the employer shall be liable for compensation as determined in subdivision (f) *only if* such compromise is made with his written approval." (Emphasis added).

There are three principal decisions that interpret Section 33(g) on the question of what constitutes a "compromise": *Marlin v. Cardillo*, 68 App. D.C. 201, 95 F.2d 112 (1938); *Bell v. O'Hearne*, 284 F.2d 777 (4th Cir. 1960); and this Court's decision in *Banks v. Chicago Grain Trimmers Ass'n., Inc.*, 390 U.S. 459 (1968).

In *Marlin v. Cardillo*, decided in 1938, the Court found simply that after an award of compensation the employee's widow had commenced a suit against a third party, "but on February 3, 1936, without obtaining the consent of the employer or the carrier, [she] settled and compromised it for $1,995.00" and "A verdict and a judgment entered in her favor were duly marked satisfied." The widow then filed a claim for further compensation under the Act, but the Court concluded that she had compromised her third party suit without the consent of the employer and therefore under Section 33(g) she could not recover further compensation.

In *Bell v. O'Hearne*, 284 F.2d 777 (4th Cir. 1960), a longshoreman was killed when he jumped from his employer's vessel to escape a collision with another ship. His parents sued a third party and recovered judgment in the amount of $6,500.00. The third party noted an appeal; and before that appeal was heard, the employee's parents accepted $5,000.00 in satisfaction of that judgment without obtaining the written approval of the employer. The parents then filed and were granted a claim for deficiency compensation in excess of the *face amount* of the judgment. The Court of Appeals upheld this award. After reviewing New York cases and distinguishing *Marlin v. Cardillo* on the ground that "there settlement of the plaintiff's claim was reached before the court had established the amount of the third party's liability and reduced it to judgment" (284 F.2d, at 779), the Court of Appeals held:

> "Where, however, there has been a *judicial determination* of the damages, there is no possibility whatever of prejudice to the employer from the judgment creditor's subsequent consent to a diminution in payment. . . ." (Emphasis supplied) (284 F.2d at 780)

Finally, and most specifically stating the test to be applied, is this Court's decision in *Banks v. Chicago Grain Trimmers Ass'n., Inc.*, 390 U.S. 459 (1968). There, the petitioner's husband died as the result of a fall he suffered on his way

home from work. Petitioner made claim for death benefits, but her claim was denied because there was insufficient proof that her husband's death was work-connected. She filed a second claim for death benefits and then began a suit against a third party to recover damages for her husband's death. In that suit, a verdict was rendered in her favor for $30,000, and the third party moved for a new trial. The trial judge ruled that he would grant this motion unless the petitioner agreed to a remittitur of $11,000. Petitioner then agreed to this without consulting her husband's employer, and a judgment in the third party suit was entered in her favor for $19,000. There was later a hearing on the petitioner's second claim for death benefits, and the Deputy Commissioner entered an award. The employer then sought judicial review of this award, arguing, among other points, that petitioner's acceptance of the remittitur was a "compromise" under Section 33(g). This Court rejected that argument (390 U.S., at 466-467), finding first that under New York law, after which the Longshoremen's Act was patterned, it had been held that a remittitur is not a compromise (citing and quoting from *Gallagher v. Carol Construction Co.*, 272 N.Y. 127, 5 N.E.2d 63 (1936)). This Court then declared:

> "An order of remittitur is a *judicial determination* of recoverable damages; *it is not an agreement among the parties involving mutual concessions.* Section 33(g) protects the employer against his employee's accepting too little for his cause of action against a third party. That danger is not present *when damages are determined,* not by negotiations between the employee and the third party, *but rather by the independent evaluation of a trial judge.* Cf. Bell v. O'Hearne, 284 F.2d 777." (390 U.S., at 467). (Emphasis supplied)

B. New York Decisions

Because this Court may look again at New York cases as relevant in deciding this case, the following New York cases may be noted, all being decided by the New York Court of Appeals or by the Third Department of the Appellate Division of the New York Supreme Court.

In *Gallagher v. Carol Construction Co.*, 272 N.Y. 127, 5 N.E.2d 63 (1936), which this Court cited and quoted in the *Banks* case, the New York Court of Appeals ruled that a claimant's accepting a remittitur that would reduce a $5,000 verdict to a judgment of $2,000 was not a compromise. The Court of Appeals distinguished one of its prior decisions (*Roth v. Harlem Funeral Car Co.*, 268 N.Y. 661, 198 N.E. 545 (1935)) as involving an agreed settlement out of court where "No verdict was recorded, and no judgment thereon was entered." The Court declared:

> "The contrary is true here. The judgment for $2,000 was rendered in accordance with immemorial common-law practice *after a full and constitutional jury trial.* The optional order of remittitur and the stipulation of plaintiff pursuant thereto did not constitute a waiver of a jury trial. They were integral incidents of a jury trial *actually had* which eventuated by constitutional practice in a judgment actually entered." (Emphasis supplied) (5 N.E.2d, at 64).

It was after saying this that the New York Court of Appeals held, in the language this Court quoted in the *Banks* case, that: "Plaintiff's stipulation consenting to take that portion of the verdict *judicially determined* as being not excessive does not fall within any recognized meaning of the word 'compromise'" (Emphasis supplied) (5 N.E.2d, at 64).

In *Klump v. Erie County Highway Department*, 275 App. Div. 1017, 91 N.Y.S.2d 689 (1949), cited in *Bell v. O'Hearne*, there was an appeal from a compensation award on the ground that a settlement of a third party suit had been made without the consent of the carrier. In a brief per

curiam opinion, the Court affirmed the award, stating that: "The judgment, which claimant *recovered* in his third party action, represents the trial court's evaluation of the damages sustained and was not the result of any settlement or compromise between the parties." (Emphasis supplied) From this, it seems certain this case involved a judgment recovered after trial before a trial judge, perhaps sitting without a jury, but still thus making a "judicial evaluation" of the damages upon evidence presented.

In *Sadowski v. J.W. Danforth Co.*, 2 App. Div. 2d 728, 152 N.Y.S.2d 626 (1956), the Court concluded that there had been no compromise where "Prior to trial of the action, the attorneys concerned had two or three discussions as to settlement. On the day the case was reached for trial, claimant's attorney told him he believed the case would be settled and later asked him to approve a settlement figure of $10,000, which he did. In the presence of his attorney and an insurance company representative, claimant signed a paper, but so far as appears no effort was made to subpoena such paper on the hearing herein. When the case was reached, both attorneys appeared and waived a jury. *Claimant testified as to all the facts relevant to liability and damages and exhibits were received.* Defendant's attorney did not cross-examine and put in no proof. *The trial court then found defendant negligent and the plaintiff free from negligence and directed judgment for $10,250.00.*" (Emphasis supplied) The Court concluded:

> "We cannot say, as a matter of law, upon the record before us, that this result did not represent the trial court's considered judgment and evaluation, based on the evidence, which appears to have been adequate to enable him to reach a fair determination."

In *Kushner v. Kingston Knitting Mills, Inc.*, 2 App. Div. 2d 394, 156 N.Y.S.2d 474 (1956), also cited in *Bell v. O'Hearne*, the Court found no compromise where the claimant and her husband "recovered judgment" against the third party. Jury trial was waived, and the parties proceeded before the trial justice sitting alone. The claimant testified

"as to her employment, the happening of the accident, the extent of her injuries, the medical treatment received, her earnings at the time of the accident, the length of time lost from work, and her work activity following the accident." She was then cross-examined "concerning her awareness of the work being carried on by defendant in the employer's factory, the happening of the accident and the continuation of her medical treatment." After this, it was stipulated that the third party was doing work at the employer's plant which the claimant alleged was negligently performed. The trial justice then found that the defendant's negligence was the sole cause of the claimant's injuries, and that those injuries and the claimant's pain and suffering and medical expenses "*entitled* her to a verdict" of $3,250.00 and that her husband "was *entitled* to a verdict" of $500 for the loss of his wife's services. (Emphasis supplied) Thereafter, "Formal findings of fact and conclusions of law were presented to the trial justice and signed by him. Judgment thereon was accordingly entered." The employer alleged that the record showed that the trial was "not a legitimate contest between opposing parties," that the insurance carrier had refused to settle, and that the claimant's attorney knew the limits of the third-party's insurance policy were $5,000. The Court held that "These factors are evidence which must be considered with the presumption of regularity which attaches to a trial, followed by a formal decision of the trial justice and a judgment." Quoting then from the *Sadowski* case, *supra,* the Court sustained the subsequent award of compensation.

The case of *Clark v. Oakes & Burger Co.*, 16 App. Div. 2d 490, 229 N.Y.S.2d 513 (1962), involved a fact situation that was the same as in *Bell v. O'Hearne,* from which the Court quoted extensively. As in *Bell v. O'Hearne,* the claimant had also recovered a judgment in his third-party suit and the third party noted an appeal, but agreed to drop the appeal if the claimant accepted a lesser sum to satisfy the judgment, which the claimant did. Finding that this was no bar to later recovery of deficiency compensation, the Court stated:

> "The dictates which have required the stern application of subd. 5 prior to judgment even when events *subsequently* indicate that no prejudice to the carrier is involved disappear when a judgment is entered and the continued prosecution of an appeal could not possibly benefit the carrier . . . . Any loss is from the claimant's own pocket. Can we say that he cannot give up part of his protection, completely at his own expense, to insure a favorable recovery?"

In *Sigismondi v. Sigismondi Excavators, Inc.*, 33 App. Div. 2d 625, 304 N.Y.S.2d 732 (1969), *modified on reargument on other grounds*, 33 App. Div. 2d 944, 307 N.Y.S.2d 856 (1970), the claimant's husband suffered a fatal injury at work. She sued a third party and recovered a verdict for $8,500.00, which by stipulation was increased, and judgment awarded for $54,350.85. This judgment was later compromised for $24,000.00 by order of the Surrogate's Court, and the claimant then obtained an award of death benefits. On appeal, the Court affirmed this award, finding there had been no "compromise of any . . . cause of action . . ." under the Workmen's Compensation Law and stating:

> "To be distinguished from the compromise of a cause of action is the compromise of a judgment. When a third-party action has been tried to its conclusion *and the measure of liability has been judicially determined*, the carrier is not prejudiced by a subsequent compromise entered into by the parties to the action in an effort to facilitate satisfaction of the judgment. (Matter of Gallagher v. Carol Constr. Co., 272 N.Y. 127, 5 N.E.2d 63; Matter of Clark v. Oakes & Burger Co., 16 A.D.2d 490, 229 N.Y.S.2d 513)" (Emphasis supplied).

The most recent New York decision on this subject appears to be *Bruce v. Westinghouse Electric Corp.*, ___ App. Div. 2d ___, 320 N.Y.S.2d 603 (1971). Citing *Clark v. Oakes and Burger Co., supra*, the Court found there had been no compromise that required the carrier's consent. "Claimant's attorney in the negligence action testified that both before

and after the *trial*, which was rendered in a jury verdict of no cause of action which the Trial Judge set aside, he rejected offers to settle the action for $10,000, the policy limit of the defendant's liability insurance policy, because the appellant would not consent to settlement. And while thereafter claimant successfully moved to amend his *ad damnum* clause to $10,000 and the trial court granted judgment in his favor for that amount, the attorneys who represented the parties in the negligence action testified at the compensation hearing to the effect that the motion for judgment in favor of the claimant *was left entirely to the trial judge and that no agreement was made with the judge* and the judge testified that there was no advance agreement as to claimant's motion and *essentially that he exercised his 'free judgment' in disposing of the motions.*" (Emphasis supplied).

C. The Court of Appeals Decision Must be Affirmed

The Court of Appeals correctly understood this Court's decision in the *Banks* case to mean that there is a "compromise" under Section 33(g) barring further compensation when settlement of a third-party suit is not the result of "the judge's independent finding of the value of the claim *after full presentation of the evidence*" (Emphasis supplied). There was in this case no trial on the merits, no testimony was offered, no jury was impanelled, and no verdict rendered (A. 36, 39-40), so that the parties' dispute was never adjudicated. Judge Youngdahl's evaluation of the case as being worth $5,000 was for the purpose of settlement, where many considerations come into play, such as the odds of recovery, the effect of conflicting testimony and medical evidence, and other matters, all of which differ materially from evaluating and deciding a case from the point of view of the trier of facts and the judge of the law. Respondents submit that it is clearly only this latter function that can constitute a "judicial determination" of the case.

There indeed can be no *judicial* determination or evaluation of a case unless, as with an order of remittitur as in the *Banks* case, the judge acts in his judicial capacity, that is, he evaluates the case upon review of sworn testimony and evidence of record. Absent this, as was the situation here, the judge's expression of his "feelings" of the worth of the case, stated in the course of his participation in pretrial settlement discussions with the parties' counsel in his chambers, does not constitute his judicial act. Furthermore, as the Court of Appeals rightly held, the record shows no indication that Judge Youngdahl in any manner forced or imposed his evaluation upon counsel, but that both counsel felt entirely free from any threat of adverse action by the judge to accept or reject the $5,000 figure. This again stands in sharp contrast to the remittitur procedure in the *Banks* case where the trial judge, in effect, ordered the plaintiff to accept an amount less than the verdict on pain that he would otherwise grant the defendant's motion for a new trial. Thus, the Court of Appeals was accurate when it found that Judge Youngdahl had made "at most an informal private settlement—a practice within a familiar tradition and well understood by the participants," and did not in any way force acceptance of his suggested figure. This amounted to the parties' private, mutually arranged, settlement of the case, and it presented and preserved, as the Court of Appeals concluded, the danger against which Congress intended Section 33(g) to protect the employer, that his employee might, in making such a "compromise," accept too little for his cause of action against the third party.

II.

PETITIONER'S CLAIM FOR ADDITIONAL COMPENSATION WAS NOT TIMELY FILED

Section 22 of the Longshoremen's Act (Title 33, U.S. Code, Section 922) requires that claims for additional compensation must be filed with the Bureau of Employees' Compensation within one year after the last payment of

compensation under the award thus sought to be modified. Here, however, the last payment of compensation under the award of August 24, 1964, was paid to petitioner on August 24, 1964 (A. 7) and the claim for additional compensation was filed on July 26, 1967 (A. 7, 27-28).

Petitioner argues that respondents waived this defense by not asserting it at the "first hearing" as required by Section 13(b) of the Act (Title 33, U.S.Code, Section 913(b)). Respondents raised this defense in a memorandum filed after the hearings but before the record was closed (A. 59, 48, 49), and they submit this was timely and caused no prejudice to petitioner, who could thereafter have submitted material responsive to this defense. In any event, while they find no case deciding this question, they submit that Section 13(b) clearly does not apply to claims for additional compensation under Section 22. Section 13(a) provides that claims must be filed within one year "after the injury" and thus pertains to original claims and not claims for additional compensation. Section 13(b), upon which petitioner relies, then states that "Notwithstanding the provisions of subdivision (a)," the failure to file a claim within the one-year period will not bar the claim unless objection on this ground is made at the "first hearing of such claim in which all parties in interest are given reasonable notice and opportunity to be heard." Section 13(b) thus applies by its terms only to the claims mentioned in Section 13(a), not to claims under any other section of the Act.

Section 22, on the other hand, contains its own time limit and does not refer directly to Section 13 or otherwise provide that objection for failure to meet that time limit must be raised at any particular stage of the proceeding. Section 22 does provide that when a claim for additional compensation is timely filed, "the deputy commissioner may . . . review a compensation case in accordance with the procedure prescribed in respect of claims in section 19." Subsection (a) of Section 19 states that "Subject to the provisions of section 13," a claim for compensation may be filed with the deputy commissioner "at any time after the

first seven days of disability following any injury, or at any time after death," but here again this pertains only to original claims and not to claims for additional compensation. The remainder of Section 19 sets forth the procedure which the Deputy Commissioner must follow in processing and deciding the claim, and respondents submit that it is only to this procedure that Section 22 refers. Section 13(b) therefore does not govern the time when objection for failure to make timely claim for additional compensation under Section 22 may be raised, since if Congress had so intended, it would have phrased Section 22 to make a more direct and unambiguous reference to Section 13.

III.

PETITIONER'S PLEADING ATTACKING THE DEPUTY COMMISSIONER'S FINDING OF DISABILITY WAS NOT TIMELY FILED, AND, IN ANY EVENT, THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THAT FINDING.

A. Section 21(a) of the Longshoremen's Act (Title 33, U.S. Code, Section 921(a)) requires that actions to enjoin and set aside workmen's compensation awards must be brought within 30 days of the entry of the award, after which the award becomes final. The award here was filed on August 12, 1968, but petitioner's "Counter-claim and Cross-claim," raising for the first time the issue of the lawfulness of the finding of temporary partial disability, was not served until January 14, 1969, and not filed until March 4, 1969 (A. 65, 66). This cross-claim and counter-claim charged that the order was unlawful and not supported by the evidence, and it thus was an appeal from and attack upon that order and an effort to have the order suspended and set aside. Since, therefore, the cross-claim and counter-claim raising this issue was not filed within 30 days from the date of the order, it was not timely and must be disregarded. *Associated Indemnity Corp. v. Marshall*, 71 F.2d 235 and 420 (9th Cir. 1934); *Scott v. Alaska Industrial*

Board, 123 F. Supp. 361 (D. Alaska 1954); *Kiser v. Bartley Mining Co.*, 397 S.W.2d 56 (Ky. 1965).

Petitioner's reliance on cases under the Federal Rules of Civil Procedure is of no avail because the application of those Rules is excepted on this issue by Rule 81(a)(6), as the timeliness of appeals from orders of the Deputy Commissioner is a "matter of procedure" that is provided for by Section 21(a) of the Longshoremen's Act.

B. On the merits of the issue thus sought to be raised, the Deputy Commissioner's finding that petitioner sustained temporary partial disability that ended as of November 1, 1965, and at that point his condition reverted to its pre-injury status, was clearly supported by the substantial evidence of record.

At the hearing, petitioner's medical witness was Dr. Marvin Korengold, a specialist in neurology (A. 10). From a neurological standpoint, there was no dispute that Dr. Korengold testified that petitioner's disability was "zero" (A. 21). Petitioner relies upon Dr. Korengold's testimony that he believed petitioner was emotionally disabled and that the accident aggravated his pre-existing condition (A. 21), but in saying this, Dr. Korengold testified: "From an emotional point of view, this really becomes a psychiatric determination, which I don't know would be fair of me to state." (A. 21). Further, at the hearing the following colloquy took place regarding Dr. Korengold's testimony:

Q. "But you have indicated, I think, that since we are dealing with the emotions, it is more peculiarly the field of the psychiatrist both as regards diagnosis and treatment?

A. "I think basically this is true, yes." (A. 24)

On the other hand, there was of record before the Deputy Commissioner, as offered by respondents, a report, dated December 23, 1965, by Dr. Leon Yochelson, a psychiatrist (A. 50-54, 48, 49), in which Dr. Yochelson found, after a thorough examination of petitioner and a study of his past

records, that there was no relationship between his complaints and his injury on October 19, 1962 (A. 54).

Such evidence of record provided a substantial basis for the Deputy Commissioner to conclude, as he did, that petitioner should be paid on the basis of temporary partial disability from November 2, 1963 to October 31, 1965, and that on November 1, 1965, his condition reverted to what it was immediately before the injury. Under accepted law, the Deputy Commissioner's findings on questions of fact and credibility of witnesses must be accepted if supported by "substantial evidence." *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469, 477-78 (1947); *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 508 (1951); *Voehl v. Indemnity Insurance Company of North America*, 288 U.S. 162, 166 (1933); *Banks v. Chicago Grain Trimmers Ass'n., Inc.*, 390 U.S. 459, 467 (1968).

Especially in view of the weakness of Dr. Korengold's testimony on what he admitted was a psychiatric question, the Deputy Commissioner could reasonably choose to credit Dr. Yochelson's report, which in this situation, absent any request by petitioner to cross-examine him, was acceptable as substantial evidence to support the award. Cf., *Richardson, Secretary of Health, Education, and Welfare v. Perales*, 402 U.S. 389 (1971). The form of the Deputy Commissioner's "status" finding, which petitioner argues was insufficient, since it did not find that petitioner was able to return to work, was, to the contrary, lawful and proper, since, in effect, it found that as of November 1, 1965, petitioner's injuries resulting from his employment ceased to be a cause of his disability. The Longshoremen's Act, in Section 2(10) (Title 33, U.S. Code, Section 902(10)), defines "disability" to mean "incapacity *because of injury* to earn the wages which the employee was receiving at the time of injury in the same or any other employment." (Emphasis supplied).

CONCLUSION

For the foregoing reasons, respondents respectfully submit that the decision of the Court of Appeals must be affirmed.

Respectfully submitted,

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McCLANAHAN *v.* MORAUER & HARTZELL, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 70-5097. Argued October 21, 1971—Decided November 8, 1971

— U. S. App. D. C. —, 439 F. 2d 550; certiorari dismissed as improvidently granted.

John Louis Smith, Jr., argued the cause for petitioner. With him on the brief was *George H. Mitchell, Jr.*

James C. Gregg argued the cause for respondents. With him on the brief was *James F. Bromley.*

PER CURIAM.

Under § 33 (g) of the Longshoremen's and Harbor Workers' Compensation Act, an employer is not obligated to pay compensation to an employee who, without the employer's written approval, settles a claim against a third person for an amount less than the compensation to which the employee is entitled under the Act. 44 Stat. 1441, as amended, 33 U. S. C. § 933 (g). Certiorari was granted in this case, 402 U. S. 1008 (1971), in the view that it presented the question whether the consent judgment entered by the District Judge awarding petitioner damages against a third person evidenced a "compromise" subject to § 33 (g), or an award of damages "determined . . . by the independent evaluation of a trial judge," not subject to § 33 (g) under *Banks* v. *Chicago Grain Trimmers Assn.*, 390 U. S. 459, 467 (1968). Fuller examination of the case on oral argument discloses that the record does not adequately present that question. The writ of certiorari is therefore dismissed as improvidently granted.

It is so ordered.

MR. JUSTICE DOUGLAS, dissenting.

I am unable to agree that the circumstances of this case fail to pose the question whether a consent judgment pursuant to a federal pretrial conference constitutes a "compromise" within the meaning of § 33 (g) of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1441, as amended, which reads:

> "If compromise with such third person is made by the person entitled to compensation . . . of an amount less than the compensation to which such person . . . would be entitled . . . the employer shall be liable for compensation as determined in subdivision (f) of this section only if such compromise is made with his written approval."

Petitioner McClanahan was employed by respondent when a steel bar struck his head. On August 24, 1964, the Bureau of Employees' Compensation found that the injury had caused temporary total disability and ordered the respondent to compensate McClanahan in the amount of $3,780. While these proceedings were pending, the petitioner instituted a civil action in the District Court against a third party, alleging that its employees had contributed to his injury. Before the civil action came to trial, the judge conducted a pretrial conference during which he spoke with counsel first together and then individually. During these conversations the judge suggested that he had reviewed the file and that he believed the plaintiff's case was worth about $5,000 (although McClanahan had sued for $9,000). Other sums were discussed but the parties accepted his suggestion. On March 3, 1967, a consent judgment was entered for $5,000 of which petitioner's wife received $3,000 and he received $2,000. Of petitioner's share $800 was retained by his lawyer and the remaining $1,200 of the petitioner's share

was transferred to his employer's insurance carrier as partial reimbursement for disability payments previously made under the Board's 1964 order.

Thereafter, on July 26, 1967, the petitioner filed with the Bureau a claim for modification of its 1964 compensation award, alleging that his injuries were more serious than previously realized. The Deputy Commissioner agreed with at least part of his assertions and added $2,328.70 to the prior award.

On appeal, however, the lower courts were persuaded that the employer was immune from further liability because the petitioner had "compromised" his claim against a third party. The Longshoremen's and Harbor Workers' Act provides that an employer is liable only for the excess of a worker's injury over any amount a worker may recover from a third party. Thus, an employer is benefited when an injured employee obtains a larger judgment from a third party. To protect employers from ill-advised compromises by employees § 33 (g) generally relieves an employer of further liability if, without his written approval, his injured servant settles with another possible defendant. Thus, in the instant case, because the respondent had not subscribed to the consent judgment the lower courts held that it had been spared further payments to McClanahan.

We granted certiorari to consider whether the lower courts' holdings conflict with our decision in *Banks* v. *Chicago Grain Trimmers Assn., Inc.*, 390 U. S. 459 (1968), that an employee's acceptance of a judicially ordered remittitur in lieu of a new trial was not a "compromise" within the meaning of § 33 (g). 402 U. S. 1008 (1971). *Banks* involved a similar chain of events except that Banks unlike McClanahan went to trial and a jury awarded him $30,000, which the judge thought was excessive. The court accordingly said it would order a new trial unless the parties agreed to a remittitur which

would reduce the total judgment to $19,000. Banks accepted without obtaining his employer's consent. We held that his acquiescence had not constituted a "compromise" because it had been induced by the "independent evaluation of a trial judge" and the danger of Banks' accepting too little had not been present. 390 U. S., at 466, 467.

Similarly, no risk of unwise compromise faced McClanahan's employer. Pretrial conferences are the last stop before the final stage in the trial litigation process. Preceded by pleadings and discovery, the conference previews the expected trial scenario, weeds out illusory and frivolous issues, and exposes the substance of conflicting claims. Because pretrial judges review the evidence to be presented in light of the clarified issues, they are in a position to assess the outcome. Thus, one widely applauded function of the pretrial conference has been its encouragement of settlements in personal-injury cases. While some dispute continues as to the degree of persuasion a judge should exercise in obtaining a settlement, critics have not complained that pretrial conference settlements have been unreasonable or unfair. See F. James, Civil Procedure 228 (1965); Wright, The Pretrial Conference, 28 F. R. D. 141, 145–147 (1960); Brennan, Introduction to the Problem of the Protracted Case, 23 F. R. D. 376, 378–379 (1958); Clark, Objectives of Pre-Trial Procedure, 17 Ohio St. L. J. 163, 167 (1956). Thus McClanahan's trial judge below surveyed the evidence which was to be presented at trial and after discussion with both adversaries suggested that the expected value of McClanahan's case was about $5,000. That assessment was made by one experienced in understanding how juries are likely to view a claim. Absent circumstances not shown here, we should presume that such evaluations are reasonable and do not prejudice employers' interests.

In *Banks*—unlike here—the judge had seen a full jury trial's worth of evidence. But in both situations there were critical assessments of the expected values of plaintiffs' *future* prospects. In *Banks* the employee might well have adduced different, stronger evidence at a second trial, or, the remittitur order may have been vacated on appeal. In settling on a suggested remittitur of $11,000 the court may have extrapolated from hindsight but it had no more, perhaps even less, information concerning Banks' eventual success than had McClanahan's pretrial judge concerning his prospects. The important similarity between these cases is that an independent and informed forecast was made of events yet to unfold.

Moreover, we have construed § 33 (g) so as to confine this defense to those situations where an employer can demonstrate actual prejudice from unilateral settlements by the employee. In *Chapman* v. *Hoage*, 296 U. S. 526 (1936), our first opinion discussing § 33 (g), the employer claimed prejudice because his employee had unilaterally discontinued a lawsuit against a third party. The trial judge had made no assessment of its prospects. The worker had simply failed to prosecute his case. This Court ultimately determined that the lawsuit had been worthless and that absent a showing of actual prejudice the employer was not entitled to a windfall "compromise" defense as a result of its dismissal.

The trend in other jurisdictions has been to avoid the harshness resulting from strict applications of statutes requiring consent of employers in third-party settlements. Under the analogous provision of the New York employees' compensation statute after which the federal Act was modeled,[1] circumstances similar to the instant facts have been held nonprejudicial to employers.

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[1] *Banks* v. *Chicago Grain Trimmers Assn., Inc.*, 390 U. S. 459, 466 (1968).

Sadowski v. *J. W. Danforth Co.*, 2 App. Div. 2d 728, 152 N. Y. S. 2d 626 (1956), effectively differed from the instant case only in that the conference was held in the courtroom rather than in chambers:

> "Prior to trial of the action, the attorneys concerned had two or three discussions as to settlement. On the day the case was reached for trial, claimant's attorney told him he believed the case would be settled and later asked him to approve a settlement figure of $10,000, which he did. In the presence of his attorney and an insurance company representative, claimant signed a paper, but so far as appears no effort was made to subpoena such paper on the hearing herein. When the case was reached, both attorneys appeared and waived a jury. Claimant testified as to all the facts relevant to liability and damages and exhibits were received. Defendant's attorney did not cross-examine and put in no proof. The trial court then found defendant negligent and the plaintiff free from negligence and directed judgment for $10,250. We cannot say, as a matter of law, upon the record before us, that this result did not represent the trial court's considered judgment and evaluation, based on the evidence, which appears to have been adequate to enable him to reach a fair determination. In a case where the facts were somewhat more favorable to the compensation insurance carrier than here, we held that the judgment represented the 'trial court's evaluation of the damages sustained and was not the result of any settlement or compromise.' (*Matter of Klump* v. *Erie County Highway Department*, 275 App. Div. 1017, motion for leave to appeal denied 300 N. Y. 761.)"[2]

[2] In *Klump*, the third party and the plaintiff-employee waived a jury, the latter testified briefly, the former conceded liability, and

The purpose of the Longshoremen's and Harbor Workers' Compensation Act was to guarantee a minimum level of compensation to covered employees. The record clearly reveals that McClanahan has not yet received that statutory minimum.

We should not depart from our holding in *Banks*. Where a plaintiff cannot rely on the judgment and experience of a federal district judge, he has no choice but to refuse any disposition of the case short of a full trial and numerous appeals. In these days of crowded court dockets, the effect of the rule adopted by the Court of Appeals will be to discourage consent judgments in cases of this kind and force all such litigation through the trial process, further overwhelming already overburdened judges. Finally, there is something most inequitable in holding that a personal-injury plaintiff who relies on the good faith and judgment of a federal judge should thereafter be penalized and deprived of compensation for his injury because of his reliance. I would reverse the decision below to enforce the congressional mandate contained in the Longshoremen's and Harbor Workers' Compensation Act as we did in our decision in *Banks*.

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when both agreed that damages ranged between $4,000 and $4,500, the trial judge entered a judgment for $4,300. Before the compensation board the employer later argued unsuccessfully that this judgment had constituted a compromise. *Klump* v. *Erie County Highway Department*, 275 App. Div. 1017, 91 N. Y. S. 2d 689, leave to appeal denied, 300 N. Y. 761, 90 N. E. 2d 69. The opinion of the state workman's compensation board is reported at State of New York Workman's Compensation Board, Special Bulletin No. 229, p. 192 (1949).